Roney v St
44 Wis. 2d 522, 531–32 (1969)
St v Hockings
86 Wis. 2d 709, 716 (1979)
Martin v St
87 Wis. 2d 155, 165–66 (1979)

B. Custodial statements volunteered (not in response to questioning) admissible without warnings

1) Distinction between being able to talk with police and interrogation

McClellan v St
53 Wis. 2d 724, 732 (1972)

2) Def's "braggadocio" while in custody deemed voluntary

St v Isham
70 Wis. 2d 718, 731 (1975)

C. No warnings required when Def's voice used only to establish voice levels and characteristics

Pennsylvania v Muniz
110 SCt 2638 (1990)
St v Stevens
181 Wis. 2d 410 (1994)
St v Bryant
2001 WI App 41
241 Wis. 2d 554

D. Routine booking questions not interrogation, but only if in actual process of booking

St v Harris
2017 WI 31, ¶ 22
374 Wis. 2d 271

E. Asking suspect whether the suspect is willing to give a statement is not reasonably likely to elicit an incriminating response and therefore does not constitute interrogation

St v Fischer
2003 WI App 5
259 Wis. 2d 799

F. Police responding to Def's questions after telling Def they wanted to talk with him about crime while in custody is <u>not</u> interrogation

9. Determining Whether Suspect Effectively Invoked *Miranda* Rights

Oregon v Bradshaw
103 SCt 2830 (1983)
Edwards v Arizona
101 SCt 1880 (1981)

A. Def's requests to remain silent or consult with Atty must be scrupulously honored to protect full exercise of 5th and 6th Amendment privileges

St v Coerper
199 Wis. 2d 216 (1996)
St v Jones
192 Wis. 2d 78 (1995)

B. Right to silence or counsel must be personally requested by Def to be valid

C. If Def requests to remain silent, all questions must cease

St v Hampton
2010 WI App 169
330 Wis. 2d 531
St v Hassel
2005 WI App 80
280 Wis. 2d 637
St v Ross
203 Wis. 2d 66
(Ct. App. 1996)

1) Request for silence must be clear and unequivocal

St v Owen
202 Wis. 2d 620
(Ct. App. 1996)
St v Wright
196 Wis. 2d 149
(Ct. App. 1995)

2) Refusal to answer one specific question or to speak to one officer may not constitute request to remain silent

Michigan v Mosley
96 SCt 321 (1975)
St v Badker
2001 WI App 27
240 Wis. 2d 460

3) Def can reinitiate interrogation

St v Turner
136 Wis. 2d 333 (1987)
St v Hartwig
123 Wis. 2d 278, 284
(1985)
St v Pheil
152 Wis. 2d 523
(Ct. App. 1989)

4) Police may reinitiate interrogation if "scrupulously honor" Def's right to silence—Ct applies five-factor test of *Mosley* as framework for analysis

a. Original interrogation promptly terminated

b. Second interrogation resumed only after a passage of significant period of time

c. Readministration of rights at outset of second interrogation

d. Different officer resumed questioning

e. Second interrogation limited to crime that was not subject of earlier interrogation

Oregon v Bradshaw
103 SCt 2830 (1983)
Edwards v Arizona
101 SCt 1880 (1981)
St v Lampe
119 Wis. 2d 206 (1984)
St v Hampton
2010 WI App 169
330 Wis. 2d 531

D. If Def requests Atty, all questioning must cease

Edwards v Arizona
101 SCt 1880 (1981)
St v Jones
192 Wis. 2d 78 (1995)

1) Def may initiate further communication with police

   a. If Def initiates new contact, police may only listen to voluntary statement (and not interrogate) unless new waiver taken

   b. Police may not use third-party agent to instigate Def's further communication with police

St v Lee
122 Wis. 2d 266 (1985)
St v Nicholson
187 Wis. 2d 688
(Ct. App. 1994)

- See *Lee* and *Nicholson* cases for criteria to determine whether third party is agent of police

Maryland v Shatzer
130 SCt 1213 (2010)
St v Edler
2013 WI 73
350 Wis. 2d 1

2) Police may reinitiate questioning if there has been a "break in custody" that lasts at least 14 days (e.g., suspect is released from custody or transferred to a general prison population where suspect is no longer isolated in police custody)

St v Hampton
2010 WI App 169
330 Wis. 2d 531

3) If Def requests Atty, police cannot interrogate, but can ask simple questions with goal of accommodating demand for counsel

St v Coerper
199 Wis. 2d 216 (1996)
St v Badker
2001 WI App 27
240 Wis. 2d 460

4) *Edwards* request for Atty under 5th Amendment applies to all cases, whereas request for counsel under 6th Amendment is "offense-specific," *but see Texas v Cobb*, 121 SCt 1335 (2001), or may be applied to a "closely related" case

Davis v US
114 SCt 2350 (1994)
St v Conner
2012 WI App 105
344 Wis. 2d 233
St v Jennings
2002 WI 44
252 Wis. 2d 228

St v Abbott
2020 WI App 25, ¶ 36
392 Wis. 2d 232

Smith v Illinois
105 SCt 490 (1984)

E. *Edwards* rule invoked by clear and unequivocal request for counsel

1) Def's personal characteristics, including mental state, do not relax requirement that right to counsel be invoked with unambiguous and unequivocal statement

2) Any responses made by Def after clear and unequivocal request for counsel are relevant only to distinct question of later waiver of right to counsel and not relevant to clarity of initial request itself

F. *Edwards* rule not invoked by equivocal or ambiguous request

St v Jennings
2002 WI 44
252 Wis. 2d 228

1) Request is ambiguous if, in light of the circumstances, a reasonable officer would understand only that the suspect *might* be invoking the right to counsel

Davis v US
114 SCt 2350 (1994)

2) Test is objective; suspect need not "speak with the discrimination of an Oxford don"

St v Edler
2013 WI 73
350 Wis. 2d 1

3) "Can my Atty be present for this?" is sufficiently clear to a reasonable officer

Davis v US
114 SCt 2350 (1994)

4) "Maybe I should talk to a lawyer" is not clear and unequivocal

St v Abbott
2020 WI App 25, ¶ 33
392 Wis. 2d 232

5) I don't want to get in trouble with [my attorney]," "Ask [my attorney] if it's okay," and "[my attorney] said to have him here" are not clear and unequivocal

St v Cummings
2014 WI 88, ¶¶ 53–59
357 Wis. 2d 1

6) "Well, then, take me to my cell. Why waste your time? Ya know?" is not clear and unequivocal; it constitutes mere "verbal 'fencing'" with police

St v Cummings
2014 WI 88, ¶¶ 60–69
357 Wis. 2d 1

7) "I don't want to talk about this" is equivocal because it is unclear whether suspect is declining to answer questions or cutting off questioning altogether

Jones v Cromwell
75 F4th 722, 726
(7th Cir 2023)

8) "So y'all can get a public 'pretender' right now?" is equivocal because it is unclear if suspect is asking whether Atty could be contacted at that moment or is asking that Atty actually be produced

St v Coerper
199 Wis. 2d 216 (1996)

9) Simply retaining counsel is not clear and unequivocal

St v Rodgers
203 Wis. 2d 83
(Ct. App. 1996)

10) Telling another, in the presence of police, to call for a lawyer is not clear and unequivocal

St v Fischer
2003 WI App 5
259 Wis. 2d 799

11) Conditional and futuristic request for counsel ("if you read me my rights, I won't talk") is not clear and unequivocal

St v Subdiaz-Osorio
2014 WI 87
357 Wis. 2d 41

12) Inquiry about how to obtain counsel, which could have been interpreted as request for representation at some proceeding other than the interrogation, was not clear and unequivocal

Montejo v Louisiana
129 SCt 2079 (2009)
St v Delebreau
2015 WI 55
362 Wis. 2d 542

G. Retention of counsel does not automatically bar interrogation; Def may waive right to have Atty present during questioning

Moran v Burbine
106 SCt 1135 (1986)

H. No need to inform of Atty's efforts to reach suspect when Atty hired by relatives without suspect's knowledge

Moran v Burbine
106 SCt 1135 (1986)

1) Third parties may not assert Def's rights and no need to notify Def that Atty has been hired

St v Jones
192 Wis. 2d 78 (1995)
St v Hanson
136 Wis. 2d 195 (1987)

2) Same result when SPD seeks to represent accused without request from accused personally

10. Other Grounds for Suppression

Massiah v U.S.
84 SCt 1199 (1964)

A. Confessions resulting from 6th Amendment violations

St v Lewis
2010 WI App 52, ¶ 1
324 Wis. 2d 536

1) After Def is formally charged, State may not interrogate Def in absence of counsel or valid waiver of counsel

Jordan v St
93 Wis. 2d 449, 465
(1980)

2) Standard for waiving right to counsel under 6th Amendment is same as standard under 5th Amendment

State has burden to prove knowing and voluntary waiver of right

US v Henry
100 SCt 2183 (1980)
St v Lewis
2010 WI App 52
324 Wis. 2d 536

3) State may not deliberately elicit incriminating statements from Def through use of surreptitious government agents (e.g., a fellow jail cellmate or confidential informant)

St v Arrington
2022 WI 53
402 Wis. 2d 675
cert denied
143 SCt 411 (2022)

Whether third party is acting as government agent is fact specific based on extent of government's control and direction of third party

B. "Sew-up" confessions

Phillips v St
29 Wis. 2d 521, 535
(1966)
St v Bean
2011 WI App 129,
¶¶ 15–
25, 337 Wis. 2d 406

1) Considering totality of circumstances, detention for unreasonably long period violates due process and renders inadmissible any confession obtained during period

St v Benoit
83 Wis. 2d 389, 404–05
(1978)
St v Bean
2011 WI App 129,
¶¶ 15–
25, 337 Wis. 2d 406

2) Mere fact that State had sufficient evidence to sustain charge at time Def arrested and interrogated does not render confession an illegal "sew-up"

a. Sole question is whether delay in charging was inordinate and detention illegal

St v Bean
2011 WI App 129,
¶¶ 15–
25, 337 Wis. 2d 406

b. If police continue to "move forward" with the investigation, the length of the detention is not unreasonable

C. Confessions that are fruit of illegal arrest

Dunaway v New York
99 SCt 2248 (1979)
Brown v Illinois
95 SCt 2254 (1975)

1) General rule: Statement is inadmissible, unless sufficiently attenuated from the taint

St v Anderson
165 Wis. 2d 441 (1991)

St v Phillips
218 Wis. 2d 180 (1998)
St v Anderson
165 Wis. 2d 441 (1991)

2) Attenuation factors include

   a. Time between arrest and confession

   b. Intervening circumstances

   c. Purpose and flagrancy of official misconduct

St v Felix
2012 WI 36, ¶ 42
339 Wis. 2d 670

3) Narrow exception when statement is admissible and attenuation analysis not necessary: if police have probable cause to arrest Def before unlawful entry and warrantless arrest from Def's home, such violation does not require suppression of evidence obtained from Def outside the home, including statements obtained after Def was given and waived *Miranda* rights

D. Confessions that are fruit of prior inadmissible statements

Miranda v US
86 SCt 1602 (1966)
Harney v US
407 F2d 586, 590
(5th Cir 1969)
St v Schlise
86 Wis. 2d 26 (1978)

1) Admissibility of subsequent confession determined on ad hoc basis for causal relationship between earlier unconstitutional conduct and subsequent statement

2) Need to suppress subsequent statement greater when exclusion of earlier statement due to finding of coercion or involuntariness

Oregon v Elstad
105 SCt 1285 (1985)
St v Armstrong
223 Wis. 2d 331 (1999)
overruling on other grounds recognized by
St v Halverson
2021 WI 7, ¶ 21
395 Wis. 2d 385

3) Although prior voluntary, unwarned statement must be suppressed, subsequent voluntary confession with full warnings and waivers admissible

E. Confessions that are result of "outrageous government conduct"

St v Albrecht
184 Wis. 2d 287
(Ct. App. 1994)

1) Defense must show following

   a. Violation of specific constitutional right

b. Violation of fundamental fairness

c. Acts shocking to the universal sense of justice mandated by due process

F. Compelled confessions

Minnesota v Murphy
104 SCt 1136 (1984)

1) Probationer has the 5th Amendment privilege against compelled self-incrimination

St v Sahs
2013 WI 51
347 Wis. 2d 641

2) Burden on probationer to show that questioning required choosing between making incriminating statements and jeopardizing liberty by remaining silent

Kastigar v US
92 SCt 1653 (1972)
St v Quigley
2016 WI App 53, ¶ 42
370 Wis. 2d 702

3) State may not use evidence derived from compelled testimony; i.e., use compelled testimony as a lead to other evidence; burden is on State to show evidence is derived from a wholly independent source

G. Use of physical, nontestimonial evidence derived from a suppressed confession

St v Knapp
2005 WI 127
285 Wis. 2d 86

1) Intentional *Miranda* violation requires suppression of nontestimonial evidence obtained as result of confession, as fruit of the poisonous tree

a. *Knapp* holds that Wisconsin's constitution affords broader protection than the US Constitution. *Compare US v Patane*, 124 SCt 2620 (2004)

b. Violation in *Knapp* consisted of a detective deliberately questioning a suspect without *Mirandizing* him first so as to "keep the lines of communication open"

St v Knapp
2005 WI 127, ¶¶ 75–81,
285 Wis. 2d 86
Compare US v Patane
124 SCt 2620 (2004)
See St v Knapp
2005 WI 127, ¶ 38,
285 Wis. 2d 86

2) *Knapp* suggests but does not explicitly hold that the fruits of an intentional *Miranda* violation are inadmissible even if the confession is not used in the case-in-chief

See St v Knapp
2005 WI 127
285 Wis. 2d 86

3) *Knapp* did not decide effect of negligent *Miranda* violation

Harris v New York
91 SCt 643 (1971)
St v Knapp
2003 WI 121
265 Wis. 2d 278
vacated on other grnds
by St v Knapp
124 SCt 2932 (2004)

4) If, despite intentional *Miranda* violation, statement is voluntary, statement may be used in rebuttal for impeachment

§ 938.31(3)(c)5.
St v Joel I-N
(In Int of Joel I-N)
2014 WI App 119
358 Wis. 2d 404

5) Juv's confession need not be recorded if "exigent public safety" issue renders recording infeasible, for example, if a suspect in an armed robbery is in an ambulance on the way to the hospital, recording equipment is not available, and a concern for public safety warrants immediately questioning the suspect about other armed robbers still at large

§ 938.31(3)
St v Jerrell CJ
(In Int of Jerrell CJ)
2005 WI 105,
¶¶ 57 n14, 58,
283 Wis. 2d 145

H. Use of unrecorded statements of Juvs

1) *Jerrell* Ct, invoking its supervisory powers, ordered that "all custodial interrogation of Juvs in future cases shall be electronically recorded where feasible and without exception when questioning occurs at a place of detention"

2) In response to fear that confessions may be lost to technicalities, Ct noted that it might excuse "failure to record when that failure was occasioned by good-faith error or equipment malfunction or where the violation was not substantial or the contents of the interrogation were not in dispute"

St v Dionicia M
(In Int of Dionicia M)
2010 WI App 134
329 Wis. 2d 524

3) If recording of entire interrogation is feasible, partial recording is inadmissible

§ 938.31(3)(c)
§ 972.115(2)(a)
St v Moore
2015 WI 54
363 Wis. 2d 376

4) Unrecorded statement may be inadmissible even if recording stopped at suspect's request; alternatively, remedy may consist of admitting statement but instructing jury that in determining weight to be given the statement it may consider the fact that confession was not recorded; *Moore* leaves open the question which remedy applies

CR 22
JURY WAIVER

1. Waiver of Jury ..... CR 22-3
2. Withdrawal of Waiver of Jury..... CR 22-6
3. Trial by Jury of Less Than Twelve ..... CR 22-7

1. Waiver of Jury

972.02(1)
St v Anderson
2002 WI 7
249 Wis. 2d 586
St v Cloud
133 Wis. 2d 58
(Ct. App. 1986)

A. Must be done in writing or by statement in open Ct, on record, with approval of Ct and consent of State

967.08(2)

1) Waiver may be by telephone or live audiovisual means upon consent of Def and State

2) Obtain consent of State to waiver

St v Cook
141 Wis. 2d 42
(Ct. App. 1987)

a. State not required to justify refusal to consent to waiver of jury

St v Murdock
2000 WI App 170
238 Wis. 2d 301

- State may refuse to consent to either phase of a bifurcated trial

b. Def has no constitutional right to waive jury trial

St v Burks
2004 WI App 14
268 Wis. 2d 747

3) Ct need not approve waiver or explain Ct's reason for withholding approval

St v Villarreal
153 Wis. 2d 323
(Ct. App. 1989)
overruled in part by
State v Smith
2012 WI 91
342 Wis. 2d 710

B. Right to jury trial is personal, fundamental constitutional right

1) Can be waived only by Def personally

a. On record

b. In voluntary and intelligent manner

St v Anderson
2002 WI 7
249 Wis. 2d 586

Krueger v St
84 Wis. 2d 272, 282
(1978)
White v St
45 Wis. 2d 672, 682–83
(1970)

Warrix v St
50 Wis. 2d 368 (1971)

St v Resio
148 Wis. 2d 687 (1989)
St v Grant
230 Wis. 2d 90
(Ct. App. 1999)

St v Denman
2001 WI App 96
243 Wis. 2d 14

St v Hansford
219 Wis. 2d 226 (1998)

St v De Leon
127 Wis. 2d 74
(Ct. App. 1985)

C. Requires personal colloquy with Def; silent acquiescence not sufficient. Ct to

1) Address Def personally

2) Be certain Def understands what jury is and that Def giving up right to jury trial

   a. Ct must advise Def that jury verdict must be unanimous

      - Does not apply if Ch 980 petition

   b. Def entitled to 12 jurors

3) Be certain waiver freely and intelligently made

4) Complete waiver and make specific findings before dismissing jury panel and starting trial

D. Waiver of jury—suggested script

1) "Before your waiver of your constitutional right to a jury trial is accepted, I will ask you some questions to decide whether your waiver should be accepted. If you have any trouble understanding the questions, please tell me, and take all the time you need to confer with your Atty."

2) "Do you understand that you have a right to a jury trial, to have 12 people hear the testimony of all witnesses?"

St v Grant
230 Wis. 2d 90
(Ct. App. 1999)

3) "Do you understand that all 12 members of the jury must agree upon their verdict of guilty or not guilty or the Ct may not receive the verdict?"

4) "Do you understand that in a jury trial the State must prove you committed each of the 'parts' or 'elements' of the crime charged beyond a reasonable doubt to the satisfaction of all 12 jurors?"

5) "If the State fails to make that proof, you cannot be convicted of the crime charged."

6) "Do you realize that by giving up your right to a jury trial, you are agreeing that this Ct, after hearing all of the evidence will make a decision on whether or not you are guilty?"

7) "Has anyone promised you anything to give up your right to a jury trial?"

8) "Has anyone threatened you or used force of any kind to give up your right to a jury trial?"

9) "Knowing what I have just told you, do you still wish to give up your right to a jury trial?"

10) "Have you had enough time to discuss this with your Atty? Has your Atty explained your right to a jury trial to you?"

11) (To Def's Atty) "Do you believe the Def understands the right to a jury trial and is giving up that right voluntarily and intelligently?"

E. Make specific record in accepting waiver of jury trial

St v Livingston
159 Wis. 2d 561 (1991)

F. Remedy for inadequate waiver is new trial

1) Per se rule awards new trial if no personal waiver colloquy occurs

St v Grant
230 Wis. 2d 90
(Ct. App. 1999)

2) If personal colloquy occurs, Def must be granted postconviction hearing where Def can assert lack of knowledge as to alleged waiver

G. Waiver of jury as to element of offense

1) Prosecutor and defense Atty may stipulate to element of offense, however

St v Hauk
2002 WI App 226
257 Wis. 2d 579
St v Villarreal
153 Wis. 2d 323
(Ct. App. 1989)
overruled in part by
St v Smith
2012 WI 91
342 Wis. 2d 710

2) Def must personally waive right to have jury find element beyond a reasonable doubt

2. Withdrawal of Waiver of Jury

St v Cloud
133 Wis. 2d 58
(Ct. App. 1986)

A. Ct's discretion in allowing Def to withdraw waiver of jury should be liberally exercised

B. Factors to be considered

1) Def's reason for requesting withdrawal

2) Timing of request

3) Relevant changes of circumstances

4) Delay, inconvenience, or other adverse consequence of allowing withdrawal

5) Def's fundamental interest in right to trial by jury

6) Any unnecessary delay in disposition

7) Inconvenience to victims and witnesses

8) Prejudice to State

9) Interference, if any, with orderly administration of justice

C. Grant Def's motion to withdraw jury waiver unless showing made that allowing motion will substantially delay or impede cause of justice

972.02(2)

3. Trial by Jury of Less Than Twelve

A. May be agreed to any time before verdict

B. Agreement must be in writing or by statement in open Ct, on record, with approval of Ct

St v Faucher
220 Wis. 2d 689
(Ct. App. 1998)
aff'd, 227 Wis. 2d 700
(1999)

C. Requires voluntary, intentional, and intelligent waiver of jury of 12

1) Cannot be result of a Hobson's choice

D. Requires agreement by State

CR 23: SELECTION OF JURY

1. Challenge to the Array ..... CR 23-1
2. Role of Court and Parties ..... CR 23-2
3. Form and Extent of Questions ..... CR 23-3
4. Judge's Voir Dire—Suggested Script ..... CR 23-5
5. Individual Voir Dire ..... CR 23-6
6. Challenges for Cause ..... CR 23-7
7. Purposeful Discrimination Against Jurors ..... CR 23-11
8. Peremptory Challenges ..... CR 23-14
9. Additional Jurors ..... CR 23-16

1. Challenge to the Array

ABA Stds—Trial by Jury
§ 15-2.3 (1996)

A. Function and purpose

1) Dismissal of entire panel

2) Grounds: Material departure from requirements of law governing selection of jurors

B. Procedure

1) No express statutory provisions

2) Form of motion

Brown v St
58 Wis. 2d 158 (1973)
Ullman v St
124 Wis. 602 (1905)

a. Challenge array, or

b. Quash panel

3) Timeliness

US v Grose
525 F2d 1115
(7th Cir 1975)

a. Within discretion of Ct

Brown v St
58 Wis. 2d 158 (1973)

b. Generally before selecting specific petit jury

St v Burnett
30 Wis. 2d 375 (1966)

c. Challenge after commencement of trial not timely

St v Nutley
24 Wis. 2d 527 (1964)

d. Challenge on opening day of trial, but before jury selection, held timely

Wilson v St
59 Wis. 2d 269 (1973)
St v Coble
95 Wis. 2d 717
(Ct. App. 1980)
aff'd, 100 Wis. 2d 179
(1981)

C. Burden on Def to show

1) Prima facie case that panel not selected according to law, or

2) Distinctive group or class of persons systematically and intentionally excluded from jury service

St v Holmstrom
43 Wis. 2d 465 (1969)

D. Findings

1) Systematic exclusion of some representative unit of citizens from jury array, or

   a. *See* **Purposeful Discrimination Against Jurors, Sec. 7**, *infra*

2) Disproportionate representation of unit of citizens on jury array over period of time

§ 805.08(1)

2. Role of Court and Parties

A. Judge has principal role in examination of jurors

SCR 71.01

B. Voir dire examination must be on the record

§ 971.04(1)(c)
St v Tulley
2001 WI App 236
248 Wis. 2d 505
St v Harris
229 Wis. 2d 832
(Ct. App. 1999)

C. Def and counsel must be present during voir dire, and these rights may not be waived

D. Either party may supplement Ct's examination

§ 805.08(1)

E. Give panel oath before voir dire examination

1) "Do you and each of you solemnly swear (or affirm) that you will true answers make to such questions as shall be put to you touching on your qualifications to act as jurors in the pending case, so help you God?"

St v Lepsch
2017 WI 27, ¶ 47
374 Wis. 2d 98

2) A panel of prospective jurors may be sworn by clerk before panel is brought to courtroom; Def's right to be present during jury selection does not include right to be present when oath is administered

Recommendation: In the interest of transparency, in order to avoid even the prospect of harmless error, and to make a clear record, administer the oath to prospective jurors in the courtroom on the record in the Def's presence.

St v Tucker
2003 WI 12
259 Wis. 2d 484
St v Britt
203 Wis. 2d 25
(Ct. App. 1996)

F. Provision of names and other identifying information about jurors is normally necessary

1) In threatening situation, jurors may be kept anonymous, with these requirements

a. Necessary to protect jurors

b. Reasonable precautions utilized to protect Def's right to fair and impartial jury

Hammill v St
89 Wis. 2d 404 (1979)

3. Form and Extent of Questions

A. Scope

1) Within sound discretion of Ct

2) Restrictions on inquiries subject to essential demands of fairness

B. Prohibited questions

1) Hypothetical questions

2) Repetitious questions

3) Misleading questions

4) Misinforming questions

5) Confusing questions

St v Ferron
219 Wis. 2d 481 (1998)

6) Badgering or harassing questions

7) Conversational or "visiting" questions designed to establish rapport with jury

Wis JI-Cr SM-20

C. Permitted questions

1) Acquaintance or relationship to parties and Attys

2) Acquaintance or relationship to possible witnesses

Skilling v US
130 SCt 2896 (2010)

3) Prior knowledge concerning case, including media exposure

4) Interest in case or its outcome

5) Opinion concerning case

6) Bias or prejudice as to parties or issues in case

7) Hardship suffered by juror as result of being selected, taking into account anticipated length of trial

8) Personal reasons as to why juror prefers not to serve

St v Ferron
219 Wis. 2d 481 (1998)

9) Attitudes and understanding of basic principles of law in criminal case (e.g., presumption of innocence, burden of proof, right of Def not to testify, etc.)

Ham v S Carolina
93 SCt 848 (1973)

10) Attitudes as to possible racial prejudice that might apply

D. Required questions

§ 805.08(1)
Powers v Ohio
111 SCt 1364 (1991)

1) When racial bias likely to influence jury, inquiry must be made into such bias

E. Sensitive questions—procedure

1) Advance notice to Ct required, or

2) Individual voir dire used, or

Recommendation

3) Jurors advised they may respond privately in chambers

4. Judge's Voir Dire—Suggested Script

A. Jurors, I will ask you certain general questions pertaining to your qualifications to sit as jurors in this case. I will ask counsel to listen carefully to these general questions and not to repeat them. Counsel may ask the jurors generally any proper general questions and in addition may ask proper questions of each juror as to matters peculiar to such juror

§ 805.08(1)
St v Gesch
167 Wis. 2d 660 (1992)

B. If your answer to any of my questions is "Yes," please raise your hand

1) Is there anyone of you related by blood, marriage, or adoption to, or acquainted with, this Def, _____, sitting at defense table?

2) Do any of you know any member of Def's family or relations?

3) Do any of you know Def's Atty?

4) Have any of you had any business dealing with Def's Atty?

5) Do any of you know the Asst DA appearing for the State?

6) Do any of you know (here recite the names of all witnesses expected to testify in case)?

7) Have any of you any interest in this case or its outcome?

8) Is there any among you who has heard or read anything about this case?

St v Loukota
180 Wis. 2d 191
(Ct. App. 1993)

9) Is there any among you who has a feeling of any bias or prejudice for or against either party to this case?

10) Is there any among you who is a member of any police department, sheriff's department, or other law enforcement agency?

11) Is there any member of your immediate family or relation who is employed in a law enforcement related capacity?

12) Is there any among you who now has any opinion, or who has ever formed or expressed an opinion, as to the guilt or innocence of this Def?

13) Is there any among you who cannot or will not try this case fairly and impartially on the evidence that is given here in Court and under the instructions of the Court, and render a just and true verdict?

14) Any further questions appropriate to the particular case

5. Individual Voir Dire

A. When to use

1) Major case with substantial pretrial publicity

Mu'Min v Virginia
111 SCt 1899 (1991)

a. Def does not have constitutional right to explore content of prejudicial pretrial publicity to which jurors exposed

b. Def only entitled to know whether juror can remain impartial in light of previously obtained information

2) Sensitive questions to be asked

3) Risk that juror's response will prejudice entire panel

B. Discretionary with Ct

St v Migliorino
150 Wis. 2d 513 (1989)
St v Koch
144 Wis. 2d 838 (1988)

1) Subject to essential element of fairness

2) Nature and content of pretrial publicity must be made known to Ct if Ct to weigh potential for effect on jurors

C. Factors for evaluating abuse of Trial Ct discretion in denying individual voir dire

1) Whether Ct conducts thorough initial questioning of panel members

2) Whether panel members reluctant to state if have preconceived notion of Def's guilt or innocence

3) Whether Ct imposes restrictions on extent of defense counsel's questioning

Recommendation

D. To save time, ask as many general voir dire questions as possible of entire panel before starting individual voir dire

St ex rel LaCrosse Tribune v Cir Ct
115 Wis. 2d 220 (1983)

E. Individual voir dire still a public proceeding

§ 805.08(1)
§ 972.04(1)

6. Challenges for Cause

St v Mendoza
227 Wis. 2d 838, 847 (1999)

A. Def constitutionally entitled to impartial jury

§ 805.08(1)
St v Faucher
227 Wis. 2d 700, 715 (1999)

1) To be impartial, a juror must be indifferent and capable of basing verdict on the evidence

St v Gutierrez
2020 WI 52, ¶ 39
391 Wis. 2d 799
St v Funk
2011 WI 62, ¶ 31
335 Wis. 2d 369

2) Prospective jurors are presumed to be impartial; Def bears burden of rebutting this presumption and proving bias

St v Faucher
227 Wis. 2d 700, 716 (1999)

B. Grounds for excluding prospective jurors

1) Statutory disqualification

2) Subjective bias

3) Objective bias

§ 756.02
§ 805.08(1)

C. Statutory qualifications for prospective jurors

1) Resident of the Cty

2) At least 18 years of age

3) U.S. citizen

St v Carlson
2003 WI 40, ¶ 2
261 Wis. 2d 97

4) Able to understand English

§ 304.078
St v Mendoza
227 Wis. 2d 838, 852
(1999)

5) If previously convicted of a felony, has had civil rights restored

6) Not related by blood, marriage, or adoption to any party or to any Atty appearing in the case

St v Gesch
167 Wis. 2d 660, 666–67
(1992)
St v Thomas
2021 WI App 55, ¶ 45
399 Wis. 2d 277
aff'd on other grounds
2023 WI 9, ¶ 6 n10
405 Wis. 2d 654

Case law suggests that a relation must be to a third degree or less (as specified in § 990.001(16)) to be per se disqualification

7) No financial interest in the case

§ 756.28(1), (2)

8) Not summoned as a juror within the previous 4 years, unless judges in the circuit have established a specified time period between 2 and 4 years

D. Subjective bias

St v Faucher
227 Wis. 2d 700, 717
(1999)

1) Do the words or demeanor of the prospective juror reveal any opinion or bias that would prevent the juror from deciding the case on the evidence?

E. Objective bias

St v Faucher
227 Wis. 2d 700, 718
(1999)

1) Could a reasonable person in the prospective juror's position be impartial?

St v Smith
2006 WI 74, ¶ 25
291 Wis. 2d 569

2) "Important consideration" is whether juror believes he or she can be impartial

St v Smith
2006 WI 74, ¶ 31
291 Wis. 2d 569

3) Few bright-line rules about whether a person is objectively biased

St v Gesch
167 Wis. 2d 660, 666–67
(1992)

a. Relative to a third degree or less (e.g., sibling) of witness must be excluded

St v Tody
2009 WI 31, ¶ 38
316 Wis. 2d 689
St v Sellhausen
2012 WI 5, ¶ 29
338 Wis. 2d 286

b. Relatives and in-laws of judge should be excluded, *sua sponte*

4) Examples of prospective jurors who are not necessarily objectively biased

St v Louis
156 Wis. 2d 470, 479–80
(1990)

a. Police officers

St v Smith
2006 WI 74, ¶ 40
291 Wis. 2d 569

b. Employee of DA's office

F. Rehabilitating a biased juror

Patton v Yount
104 SCt 2885, 2891
(1984)
Griffin v Bell
694 F3d 817, 823–24
(7th Cir 2012)
St v Lepsch
2017 WI 27, ¶ 36
374 Wis. 2d 98

1) Ct may find that juror who initially expresses bias will be impartial if juror is sincerely willing to set aside opinion and decide case on the evidence

St v Lepsch
2017 WI 27, ¶ 36
374 Wis. 2d 98

St v Gutierrez
2020 WI 52, ¶ 41
391 Wis. 2d 799
St v Oswald
2000 WI App 3, ¶ 6
232 Wis. 2d 103

2) No magic words required to demonstrate willingness to set aside initial bias

a. Juror need not state unequivocally or definitely that bias can be set aside; Ct must determine whether juror sincerely intends to put aside bias

St v Ferron
219 Wis. 2d 481, 503
(1998)

3) Ct must refrain from "badgering" juror to set aside bias

G. Ruling on challenge

1) Challenge

St v Brunette
220 Wis. 2d 431
(Ct. App. 1998)
St v Jones
218 Wis. 2d 599
(Ct. App. 1998)

a. Must be made before jury sworn

St v Erickson
227 Wis. 2d 758 (1999)

- Decision is one of strategy for Def's Atty, and
- Failure operates as waiver of error unless Atty is ineffective counsel
- Ct may in its discretion and for good cause allow challenge after jury sworn

b. Particular grounds must be stated, unless obvious and sufficiently disclosed

c. Denials of proposed questions or objections to jurors should be put on record

St v Wyss
124 Wis. 2d 681 (1985)

2) Waiver

McGeever v St
239 Wis. 87 (1941)
Osmundson v Lang
233 Wis. 591 (1940)
Brown v
La Crosse City Gas
21 Wis. 51 (1866)

a. Failure to question disqualification constitutes waiver of all objections

b. Failure to promptly advise Ct of disqualification of juror coming to light during trial constitutes waiver

Ullman v St
124 Wis. 602 (1905)
Gatzow v Buening
106 Wis. 1 (1900)

c. Unsuccessful challenge to juror or improper exclusion of question waived by failure to object to jury as whole

Davey v Janesville
111 Wis. 628 (1901)

d. Signifying satisfaction with jury as constituted estops challenge on appeal of correctness of ruling

3) Ruling on challenge

a. Burden of proving existence of disqualification on challenging party

Hammill v St
89 Wis. 2d 404 (1979)

b. Ct has wide discretion to reject or discharge juror disqualified or incompetent to serve, on own motion

- Prospective juror is presumed impartial. Trial Ct must strike juror on finding of statutory, subjective or objective bias

St v Kiernan
227 Wis. 2d 736 (1999)
St v Ferron
219 Wis. 2d 481 (1998)

- State reasons on record

St v Erickson
227 Wis. 2d 758 (1999)

- Determination regarding sincerity of prospective juror with regard to ability to consider evidence fairly also within Ct's discretion

St v Ferron
219 Wis. 2d 481 (1998)

c. Ruling reversible only when juror's bias is manifest

St v Lindell
2001 WI 108
245 Wis. 2d 689

d. If Trial Ct has erroneously failed to strike juror for cause based on bias, Def must prove error has affected or impaired his/her substantial rights in order to obtain a new trial

- Trial Ct's failure to strike single biased juror for cause, later removed by peremptory challenge, does not impair Def's substantial rights
- But need to use multiple strikes or deliberate Ct error may cause reversal of conviction

St v Mendoza
227 Wis. 2d 838 (1999)

- Automatic reversal not required in a situation when Trial Ct has erroneously granted motion to strike juror for cause
  - — Public policy supports elimination of juror bias and judicial inefficiency

Georgia v McCollum
112 SCt 2348 (1992)
US v Chapman
158 F2d 417
(10th Cir 1946)

e. Right to challenge goes to exclude, not to include specific juror

St v Coble
100 Wis. 2d 179 (1981)

f. Juror not to be disqualified for cause solely because of personal predilection not to serve

H. Upon successful challenge for cause

1) Excuse juror, and

2) Summon another member of panel to take place

Hernandez v New York
111 SCt 1859 (1991)
Batson v Kentucky
106 SCt 1712 (1986)

7. Purposeful Discrimination Against Jurors

St v Jones
218 Wis. 2d 599
(Ct. App. 1998)

A. *Batson* challenge must be raised before jurors are sworn or issue is waived

Recommendation

Do not release jury panel until *Batson* challenges have been resolved

St v Lopez
173 Wis. 2d 724
(Ct. App. 1993)

B. Def denied equal protection when members of distinctive group purposefully excluded

JEB v Alabama ex rel TB
114 SCt 1419 (1994)
Powers v Ohio
111 SCt 1364 (1991)
St v Joe C (Paternity of Codey MR)
186 Wis. 2d 580
(Ct. App. 1994)

1) Def and excluded juror need not share same race or gender

2) State's discriminatory use of peremptory challenges harms excluded jurors by depriving them of opportunity to participate in civil life

3) Individual juror has right not to be excluded from petit jury because of race or gender

St v Davidson
166 Wis. 2d 35
(Ct. App. 1991)

a. However, kinship to a person who has been criminally charged or convicted may constitute legitimately racially-neutral reason for striking venireperson

Powers v Ohio
111 SCt 1364 (1991)

4) Def has standing to raise third-party equal protection claims of jurors excluded by prosecution because of race or gender

Oliver v Heritage Mut Ins
179 Wis. 2d 1
(Ct. App. 1993)

5) Caution: Purposeful inclusion improper

St v Guerra-Reyna
201 Wis. 2d 751
(Ct. App. 1996)

C. Peremptory challenges cannot be exercised by State to remove jurors from distinctive group on assumption that members of that group unable to impartially consider State's case or even in good-faith belief that group would be prejudiced against Def

D. To establish prima facie case of purposeful discrimination Def must show

1) State used peremptory challenges to remove jury members of distinctive group

a. Can rely on fact that peremptory challenges constitute practice that permits those to discriminate who are of a mind to discriminate

b. Facts and relevant circumstances raise inference that peremptory challenges used to exclude members of distinctive group

St v Walker
154 Wis. 2d 158 (1990)

E. Burden shifts to State to articulate neutral explanation for peremptory challenge

1) Mere denial of discriminatory intent not sufficient

St v Gregory
2001 WI App 107
244 Wis. 2d 65
St v Jagodinsky
209 Wis. 2d 577
(Ct. App. 1997)

2) Explanation must be clear and reasonably specific, demonstrating a nexus between the legitimate factors for strike and the juror who was struck

3) Must not be pretextual

4) Explanation need not rise to level justifying exercise of challenge for cause

St v King
215 Wis. 2d 295
(Ct. App. 1997)

5) If explanation for challenge is in part based on a discriminatory reason, it is a violation of Equal Protection Clause

Hernandez v New York
111 SCt 1859 (1991)

F. Ct must determine under totality of circumstances whether Def carried burden of proving purposeful discrimination

Flowers v Mississippi
139 SCt 2228, 2243
(2019)

1) Ct may consider the following factors:

a. Statistical evidence about prosecutor's use of peremptory challenges against prospective jurors of distinctive group as compared with non-distinctive group

b. Evidence of prosecutor's disparate questioning and investigation of prospective jurors of distinctive group as compared with non-distinctive group

c. Side-by-side comparisons of prospective jurors of a distinctive group who were struck and prospective jurors of non-distinctive group who were not struck

d. Prosecutor's misrepresentation of juror's statement when defending challenges during *Batson* hearing

e. Relevant history of State's peremptory challenges in past cases

f. Other relevant circumstances that bear upon issue of discrimination

St v Walker
154 Wis. 2d 158 (1990)

G. Remedy if purposeful discrimination found

1) Discharge venire and select new jury from different panel not previously associated with case

2) Disallow discriminatory challenge and resume selection with improperly challenged juror reinstated

Recommendation

a. Do not reinstate juror if juror aware of challenge by prosecutor, because of substantial likelihood of bias against prosecutor

§ 972.03
§ 805.08(3)

8. Peremptory Challenges

A. Retain more than 12 jurors to sufficiently cover total number of peremptory challenges available to all parties

St v Erickson
227 Wis. 2d 758 (1999)
St v Oswald
2000 WI App 2
232 Wis. 2d 62

1) Including additional jurors, if any

a. Each side given 1 challenge if additional jurors are empaneled

§ 972.03

B. Number of challenges

1) Single Def case

St v Erickson
227 Wis. 2d 758 (1999)

a. First-degree murder and felony carrying possible life imprisonment penalty

- 6 to each side

b. All other felonies

- 4 to each side

c. All misdemeanors

- 3 to each side

2) Multiple Def case

a. First-degree murder and felony carrying possible life imprisonment penalty

- 12, if 2 Defs
- 18, if more than 2 Defs

b. All other felonies

- 6, if 2 Defs
- 9, if more than 2 Defs

c. All misdemeanors

- 4, if 2 Defs
- 6, if more than 2 Defs

d. Adverse defenses give Ct discretion to grant additional peremptory challenges to defense

St v Lepsch
2017 WI 27, ¶ 57
374 Wis. 2d 98

3) Unobjected error in awarding correct number of peremptory strikes is not presumptively prejudicial

§ 972.04(1)

C. Order of exercise of peremptory challenges

1) Usual practice

a. State goes first

b. Alternating strikes by each side

- Note: Statute ambiguous whether State must complete all its challenges first

2) Civil practice

§ 805.08(3)

a. Civil rules expressly provide for alternating strikes

D. Waiver of peremptory challenges

§ 972.04(1)

1) If party declines to exercise peremptory challenges, clerk exercises such challenges by lot

§ 972.04(2)

2) If party waives any or all peremptory challenges in advance of empaneling jury panel, number of jurors empaneled reduced accordingly

St v Nantelle
2000 WI App 110
235 Wis. 2d 91

E. Mistake in peremptory strike

1) Relief not mandated when mistake discovered after jurors chosen but before jury sworn in

Recommendation

2) Ask Attys to acknowledge this is jury they selected before swearing jury in

§ 972.04(1)

9. Additional Jurors

A. Procedure

§ 805.08(2), (3)
St v Oswald
2000 WI App 2
232 Wis. 2d 62

1) Each side given 1 challenge if additional jurors are empaneled

§ 972.03

2) Call panel with total equal to 12 jurors plus additional jurors to be seated plus total peremptory challenges allowed, including extra needed for additional jurors

3) Each side to strike until 12 jurors plus additional jurors remain

§ 972.10(7)

4) At close of arguments and instructions, select, by lot, jurors to be excused

St v Ledger
175 Wis. 2d 116
(Ct. App. 1993)

a. Additional jurors may deliberate and vote with consent of parties

St v Lehman
108 Wis. 2d 291 (1982)

b. Reversible error to substitute alternate for another juror after deliberations have begun

CR 24: JURY MANAGEMENT

1. Swearing in Jury ..... CR 24-1
2. Jury Sequestration ..... CR 24-1
3. Postsentencing Questions About Juror Qualifications ..... CR 24-2
4. Juror Conduct ..... CR 24-3
5. Jury View ..... CR 24-3
6. Note-Taking by Jurors ..... CR 24-5
7. Jurors' Questions ..... CR 24-5
8. Jury Deliberations ..... CR 24-6
9. Hung Jury ..... CR 24-8
10. Discharge of Jurors ..... CR 24-9

1. Swearing in Jury

§ 756.08

A. Oath or affirmation must be administered to jurors selected to try case

"Do you and each of you swear (or affirm) that you will well and truly try the issue joined between _____, plaintiff, and _____, defendant, and, unless discharged by the Court, a true verdict give, according to law and the evidence given in Court, so help you God?"

St v Block
170 Wis. 2d 676
(Ct. App. 1992)

B. Swearing jury after testimony begins, but before deliberations is harmless error; does not warrant reversal unless Def shows prejudice

2. Jury Sequestration

§ 972.12

A. No mandatory sequestration

1) Discretionary in all cases

2) May be ordered at any time before submission of case to jury

§ 972.12

B. Discretionary sequestration once jury retires to deliberate on verdict

3. Postsentencing Questions About Juror Qualifications

St v King
120 Wis. 2d 285
(Ct. App. 1984)

A. Discovery during trial that juror knows or is acquainted with witness or Def

1) Ct and Atty voir dire juror to establish possible partiality

2) Ct must make record of results of voir dire

St v Alexander
2013 WI 70
349 Wis. 2d 327

3) Ct may exclude Def from in-chambers meeting if Def's Atty is present and Def's presence would not have contributed to the Ct's inquiry and might even have been counterproductive

St v Wyss
124 Wis. 2d 681 (1985)

B. False and misleading answers

St v Olson
179 Wis. 2d 715
(Ct. App. 1993)

1) Two-part burden on objecting party to establish that juror biased against party

   a. Juror incorrectly or incompletely responded to material question, and

St v Faucher
227 Wis. 2d 700 (1999)
St v Delgado
223 Wis. 2d 270 (1999)

   b. More probable than not that under facts and circumstances surrounding particular case, juror was biased against moving party

St v Williams
220 Wis. 2d 458
(Ct. App. 1998)

   c. Specific proof of bias not required

St v Faucher
227 Wis. 2d 700 (1999)

2) Ct must consider following factors in determining bias

   a. Did question asked sufficiently inquire into subject matter to be disclosed by juror?

   b. Were responses of other jurors to same question sufficient to put reasonable person on notice that answer was required?

   c. Did juror become aware of the false or misleading answers at any time during trial and fail to notify Ct?

St v Hampton
217 Wis. 2d 614
(Ct. App. 1998)
St v Hampton
201 Wis. 2d 662
(Ct. App. 1996)

4. Juror Conduct

A. Ct has important role to scrutinize attentiveness and condition of jurors

St v Saunders
2011 WI App 156, ¶ 32
338 Wis. 2d 160

St v Novy
2013 WI 23
346 Wis. 2d 289

1) Sleeping juror: Duty of party/Atty to bring to Ct's attention as soon as practicable

2) Allegation of juror inattentiveness requires twofold inquiry:

- Question of fact: Was juror inattentive to the point of potentially undermining fairness of trial?
- Question of law: Did Def suffer prejudice as result of juror's inattentiveness?

B. Any of following requires individualized voir dire initiated by Judge

1) Sleep by juror

2) Illness or hearing problem

3) Knowledge of witness not previously disclosed

4) Contact with parties, witnesses, or Attys

St v Faucher
227 Wis. 2d 700 (1999)
St v Williams
220 Wis. 2d 458
(Ct. App. 1998)

C. Serious bias or problem may require discharge of juror or mistrial

5. Jury View

§ 972.06
St v Nutley
24 Wis. 2d 527 (1964)

A. Addressed to sound discretion of Ct

1) Can demonstrative evidence achieve same end?

a. Use of photographs, maps, mock-ups, etc.

2) Do time and effort invested outweigh utility?

B. Purpose

1) Not to obtain new evidence

St v Coulthard
171 Wis. 2d 573
(Ct. App. 1992)

2) To enable jury to better understand evidence to be presented

St v Marshall
92 Wis. 2d 101 (1979)
St v Herrington
41 Wis. 2d 757 (1969)
Wis JI-Cr 152

C. Procedure

1) Hearing, before view, outside presence of jury, desirable to allow Attys to alert Ct to those matters at scene which should be brought to attention of jury

a. Motion must state, with particularity, area to be seen, with course of travel by map and text

b. Motion must include proposed text to be used by Ct for juror's benefit

Wis JI-Cr 152

2) Instruct jury that view not evidence

3) Premises viewed should be in condition akin to that which existed at time of event under inquiry

a. If not feasible, differences should be noted to jury

4) At scene, Attys not to talk with jury, but may ask Ct to point out certain things

5) Juror's questions at scene

a. Should be discouraged

b. If permitted, should be reduced to writing

6) Must be conducted on record

Amer Fam Mut Ins Co v Shannon
120 Wis. 2d 560 (1984)

a. Error to base findings on unconsented view of scene

6. Note-Taking by Jurors

§ 972.10(1)(a)1.
Wis JI-Cr 55

A. If authorized by Ct

1) Jurors may make written notes of all proceedings, except opening statements and closing arguments

2) Ct to provide materials for note-taking, if jurors request

3) Inform jurors that notes are confidential

4) Jurors may refer to own notes during proceedings and deliberations

5) Notes may not be basis for or object of any motion by a party

6) Notes to be promptly collected and destroyed after verdict rendered

§ 972.10(1)(a)2.

B. If not authorized by Ct

1) State reasons for determination on record

7. Jurors' Questions

Sommers v Friedman
172 Wis. 2d 459
(Ct. App. 1992)

A. Within discretion of Trial Ct to determine whether jurors will be allowed to submit questions for witnesses

B. Most Cts considering question of allowing jurors to submit questions for witnesses have generally confirmed propriety of jury questioning

St v Darcy NK
218 Wis. 2d 640
(Ct. App. 1998)
Wis JI-Cr 57

C. Jurors should submit questions in writing to Ct

8. Jury Deliberations

A. Sequestration

§ 972.12

1) Sequestration upon deliberation discretionary in all cases

St v Koller
2001 WI App 253
248 Wis. 2d 259

2) Judge may not communicate with jury ex parte, even on collateral matters, without knowledge and consent of parties

B. Discretionary with Ct which exhibits delivered to jury room

St v Anderson
2006 WI 77
291 Wis. 2d 673

1) Trial Ct must consider following 3 factors when exercising its discretion

   a. Whether exhibit will aid jury in proper consideration of case

   b. Whether party will be unduly prejudiced by submission of exhibit, and

   c. Whether exhibit could be subjected to improper use by jury

Recommendation

2) Other factors Ct may consider

   a. Prominence of exhibit in case

   b. Inflammatory aspects of exhibit

   c. Confusing aspects of exhibit

   d. Undue highlighting of one aspect of case or testimony

St v Jensen
147 Wis. 2d 240 (1988)

- Treat Def's confession like other exhibits

- Within Ct's discretion to determine whether written confession to be sent to jury

Recommendation

3) Resolve at jury conference

C. Role of bailiff

§ 972.12

1) May be appointed by Ct to keep jury together and to prevent communication between jurors and others during deliberations or as directed by Ct

§ 756.08(2)

2) Must be given oath or affirmation

3) Conduit between Ct and jury

4) Not to answer any questions of law or fact relative to case

§ 972.12

5) Special duties if Ct orders jury sequestered from time jurors are sworn

   a. Keep jury together at all times

   b. Prevent communication at all times between jurors and others

   c. Serve as conduit between Ct and jury throughout entire trial

   d. Tend to juror's needs and comfort at motel or hotel facility used to house jury

   e. Screen and censor all reading material and electronic media available to jury

   f. Monitor any permitted communications between juror and third parties (e.g., members of juror's family)

   g. Responsible for custody and control of jury while Ct not in session

D. Questions from jury

1) Answered on record by Ct and not off record through bailiff

St v Booth
147 Wis. 2d 208
(Ct. App. 1988)

   a. Ct has duty to respond to inquiry with sufficient specificity to clarify jury's problem

St v Crowley
143 Wis. 2d 324 (1988)

b. If juror's communication is statement, not question, Trial Judge not required to respond with own statement

Kohlhoff v St
85 Wis. 2d 148 (1978)
St v McMahon
186 Wis. 2d 68
(Ct. App. 1994)

2) Before Ct's response, parties must be given opportunity to be heard regarding appropriate response

a. Conference must be on record and in open Ct

St v Alexander
2013 WI 70
349 Wis. 2d 327

b. Def or Def's Atty must be present

E. Rereading testimony/replaying recording

St v Anderson
2006 WI 77
291 Wis. 2d 673

1) Subject to Ct's discretion

2) Must be done in open Ct with Def and counsel present

3) If the victim's testimony is reread or replayed, Ct should reread or replay Def's testimony upon jury's request in open Ct

9. Hung Jury

Kelley v St
51 Wis. 2d 641 (1971)
Wis JI-Cr 520

A. Standard jury instruction does not have "coercive" impact of "*Allen* charge"

Madison v St
61 Wis. 2d 333 (1973)

1) Jury may be told that case will have to be retried if verdict not reached

Ziegler v St
65 Wis. 2d 703 (1974)

2) Jury may not be advised of expense involved in present trial and expected costs of new trial

St v Echols
175 Wis. 2d 653 (1993)

3) Jury should not be coerced into agreement by time deadlines

B. Factors in declaring a jury deadlock

1) Probability of agreement and length of deliberation

2) Importance of case

3) Expense of retrial

4) Possibility jury may agree on some counts

Wheeler v St
87 Wis. 2d 626 (1979)

5) Double jeopardy considerations: If Def does not consent to mistrial, retrial may be barred, unless manifest necessity for new trial

St v McMahon
186 Wis. 2d 68
(Ct. App. 1994)

C. Judge may not ask numerical division

10. Discharge of Jurors

§ 972.10(7)

A. Alternate juror discharged by lot

1) See **Selection of Jury, CR 23, Sec. 9 (Additional Jurors)** for discharge for cause or incapacitation

B. Juror may be discharged for cause or incapacitation after trial begins

St v Gonzalez
2008 WI App 142
314 Wis. 2d 129
St v Williams
220 Wis. 2d 458
(Ct. App. 1998)

1) During evidentiary phase of trial

St v Spencer
2022 WI 56
403 Wis. 2d 86

2) After evidentiary phase, but before deliberations

St v Lehman
108 Wis. 2d 291 (1982)

3) After deliberations have begun

St v Lehman
108 Wis. 2d 291 (1982)

C. Procedure

1) Complete record needed to establish basis of exercise of discretion

2) State, Def, and Atty must be present and given chance to be heard

3) Detailed description necessary of how Ct became aware of juror's incapacitation or evidence justifying discharge for cause

4) Juror should be questioned

5) All argument by counsel and Ct's decision must be outside presence of jury

St v Spencer
2022 WI 56, ¶ 36 n13
403 Wis. 2d 86

6) Best practice is to avoid ex parte communications with jurors

However, ex parte communication with sick juror not erroneous when decision to dismiss juror before deliberations is on record with counsel

St v Lehman
108 Wis. 2d 291 (1982)

D. Extreme caution must be used to avoid mistrial by either

1) Needlessly discharging juror, or

2) In some manner prejudicing juror

St v Lehman
108 Wis. 2d 291 (1982)

E. Options available after discharge of juror

§ 972.02(2)

1) Obtain stipulation from the parties to substitute juror

2) Obtain stipulation to proceed with fewer than 12 jurors

a. See **Jury Waiver, CR 22**

3) Declare mistrial

a. See **Mistrial, CR 35**

CR 25
PRELIMINARY INSTRUCTIONS/ OPENING STATEMENTS

PRELIMINARY INSTRUCTIONS ..... CR 25-3

1. Procedure ..... CR 25-3
2. Standard Preliminary Instructions ..... CR 25-3
3. Common Preliminary Instructions ..... CR 25-4

OPENING STATEMENTS ..... CR 25-5

1. Manner and Purpose ..... CR 25-5
2. Scope ..... CR 25-5
3. Interruption of Opening Statements and Curative Instructions ..... CR 25-6

PRELIMINARY INSTRUCTIONS

1. Procedure

972.10(1)(b)

A. Determine whether preliminary instructions to be given (not mandatory)

B. Furnish to parties before giving, so parties may object or propose other instructions

C. Give before opening statements

2. Standard Preliminary Instructions

Wis JI-Cr 50
See also Wis JI-Civ 50

A. Pattern preliminary instruction—includes

1) Wis JI-Cr 50—Jurors' Conduct

2) Wis JI-Cr 103—Evidence

3) Wis JI-Cr 58—Transcripts not available

4) Wis JI-Cr 300—Credibility

5) Substantive Instructions on elements

6) Wis JI-Cr 101—Opening Statements

7) Lists the following as optional

a. Wis JI-Cr 140—Burden of Proof

b. Wis JI-Cr 148—Objections

c. Wis JI-Cr 55 or 56—Note-taking

d. Wis JI-Cr 57—Jurors' Questions

3. Common Preliminary Instructions

Wis JI-Cr 157

A. Statements and remarks of Attys

Wis JI-Cr 160

B. Arguments of Attys

C. Theory of defense

St v Minued
141 Wis. 2d 325 (1987)
St v Herriges
155 Wis. 2d 297
(Ct. App. 1990)

1) Def has right to submit valid theory of defense instruction only where supported by evidence and timely request made

St v Peck
143 Wis. 2d 624
(Ct. App. 1988)

2) Theory of defense instruction valid only when correctly states a defense in fact or law, which defense is applicable to crime charged

St v Amos
153 Wis. 2d 257
(Ct. App. 1989)

a. Defense not entitled to instruction that merely highlights evidentiary factors

Wis JI-Cr 190

D. Weight of evidence

Wis JI-Cr 195

E. Juror's knowledge

OPENING STATEMENTS

1. Manner and Purpose

SCR 71.01

A. Must be on the record

Beavers v St
63 Wis. 2d 597, 606
(1974)
23A CJS *Criminal Procedure and Rights of Accused* § 1731 (2016)

B. Provide framework so jury can better understand and evaluate evidence

C. Allow Attys to outline facts of case expected to be proved and to clarify and narrow issues

2. Scope

Beavers v St
63 Wis. 2d 597, 606
(1974)

A. Scope and extent of opening statement within Ct's discretion

1) Statement should be brief and general, rather than detailed

2) Argument, inferences, and opinions not permitted

3) Comments should be confined to statements based on facts that can be proved

Beavers v St
63 Wis. 2d 597, 606
(1974)
St v Albright
98 Wis. 2d 663, 675
(Ct. App. 1980)

a. Comments may not include plainly inadmissible facts

Beavers v St
63 Wis. 2d 597, 606
(1974)

b. Comments may not include facts Atty not permitted to prove

c. Comments may not include facts Atty in good faith does not expect to prove

Beavers v St
63 Wis. 2d 597, 606
(1974)

B. Use of demonstrative evidence within discretion of Ct

St v Johnson
121 Wis. 2d 237
(Ct. App. 1984)

C. Def delivers opening statement

1) Prosecutor may comment on distinction between evidence and argument

2) Prosecutor cannot comment on Def's failure to testify

3. Interruption of Opening Statements and Curative Instructions

St v
Waste Mgmt of Wis, Inc
81 Wis. 2d 555, 573
(1978)

A. Matter of discretion for Ct with or without an objection

CR 26: WITNESSES

See **CR 27** for Expert Witnesses

1. Oaths ..... CR 26-1
2. Competency of Witnesses ..... CR 26-2
3. Compulsory Process/Right to Present a Defense (See also **CR 11**) ..... CR 26-3
4. Exclusion of Witnesses from Hearing or Trial ..... CR 26-6
5. Compelling Testimony—No 5th Amendment Privilege ..... CR 26-7
6. Compelling Testimony—5th Amendment Privilege ..... CR 26-8
7. Plea Bargains and Testimony ..... CR 26-10
8. Confrontation ..... CR 26-11
9. Child's and Child-Victim's Statements ..... CR 26-16
10. Use of Former Testimony ..... CR 26-21
11. Out-of-Court Translators ..... CR 26-21
12. Privileges ..... CR 26-22
13. Rape Shield Statute: § 972.11 ..... CR 26-23
14. Attorney as Witness ..... CR 26-28
15. Defendant Perjury ..... CR 26-29
16. Rebuttal Witness ..... CR 26-30

1. Oaths

§ 906.03(1), (2)

A. Witnesses required to declare that they will testify truthfully by oath or affirmation

1) Administered in form substantially in conformity with statutory language

2) "Do you solemnly swear that the testimony you shall give in this matter shall be the truth, the whole truth and nothing but the truth, so help you God?"

§ 906.03(3)

B. If witness has conscientious scruples against taking oath or against swearing in usual form

1) Shall state a "solemn declaration or affirmation" that will testify truthfully

2) "Do you solemnly, sincerely, and truly declare and affirm that the testimony you shall give in this matter shall be the truth, the whole truth and nothing but the truth; and this you do under the pains and penalties of perjury?"

Comment

C. May consider combining oath and affirmation, i.e., "Do you solemnly swear or affirm...?"

Kellner v Christian
197 Wis. 2d 183 (1995)

D. Purpose of oath not to exclude any competent witness, but rather to add a stimulus to truthfulness whenever possible

E. Child witness

St v Gilbert
109 Wis. 2d 501 (1982)

1) Children competent to testify

St v Hanson
149 Wis. 2d 474, 482 (1989)

a. Under § 906.01, competency no longer test for admission of a witness's testimony

b. Only question is credibility

2. Competency of Witnesses

§ 906.01

A. Every person competent to be witness, unless

§ 906.01

1) Barred by particular rule

§ 906.06(1)

2) Included as member of jury, or

§ 906.05

3) Presiding at trial as Judge

B. For exceptions to general rule, see CR 32, Impeaching Jury Verdict

St v Dwyer
149 Wis. 2d 850 (1989)

C. Competency is issue of credibility to be weighed by trier of fact

§ 906.01

1) Wis Judges no longer empowered to review witness's competency

St v Hanna
163 Wis. 2d 193
(Ct. App. 1991)

2) Ct may not rule that witness unavailable because of incompetency

St v Dwyer
149 Wis. 2d 850 (1989)

a. However, witness whose testimony fails to relate to facts in issue, and is totally lacking in probative value, may be disqualified

US Const amend VI
Wis Const art I, § 7

3. Compulsory Process/Right to Present a Defense (See also CR 11)

Taylor v Illinois
108 S. Ct. 646 (1988)
St v Kirschbaum
195 Wis. 2d 11
(Ct. App. 1995)
St v Maday
179 Wis. 2d 346
(Ct. App. 1993)

A. Def has right to state's assistance in securing the raw materials for an effective defense, to compel attendance of favorable witnesses at trial, and to present evidence that might influence determination of guilt

St v Sorenson
152 Wis. 2d 471
(Ct. App. 1989)

1) Def does not have absolute right to subpoena witnesses or present testimony

2) State must show compelling state interest countervailing Def's right to subpoena victim

St v Gibas
184 Wis. 2d 355
(Ct. App. 1994)

3) State may violate 6th Amendment right to have compulsory process by arbitrarily preventing Def from presenting a witness's testimony, e.g., by intimidating defense witness

Green Bay Newspaper v Cir Ct
113 Wis. 2d 411 (1983)

B. Right to compulsory process intended to permit Def to request governmental assistance in obtaining exculpatory evidence

Green Bay Newspaper v Cir Ct
113 Wis. 2d 411 (1983)

C. Def must show reasonable probability that testimony of witness to be subpoenaed will lead to evidence that is

1) Competent

2) Relevant

3) Material, and

4) Exculpatory

Taylor v Illinois
108 S. Ct. 646 (1988)
St v Migliorino
170 Wis. 2d 576
(Ct. App. 1992)

D. Def has constitutional right to discover existence of potential witnesses

US v Nixon
94 S. Ct. 3090 (1974)
St v Migliorino
170 Wis. 2d 576, 587
(Ct. App. 1992)

1) An adjunct to maxim that the law is entitled to every person's evidence

2) Exceptions to demand for every person's evidence not lightly created or expansively construed

E. Right to present a defense

St v Morgan
195 Wis. 2d 388
(Ct. App. 1995)

1) Def has due process right to present a defense

   a. Right to a fair opportunity to defend against the State's accusations

2) Def has right to present evidence

   a. Rooted in Confrontation and Compulsory Process Clauses of US and Wis Constitutions

   b. Fundamental and essential to objective of achieving fair trial

St v Muckerheide
2007 WI 5
298 Wis. 2d 553

3) No right to present irrelevant evidence or evidence not offered for a proper purpose

St v Wilson
2015 WI 48
362 Wis. 2d 193
St v Denny
120 Wis. 2d 614
(1984)

4) Def has right to present evidence with a "legitimate tendency" to show that a third party committed a crime

St v Amos
153 Wis. 2d 257
(Ct. App. 1989)

5) Hearsay rule may not be mechanically employed to exclude testimony critical to defense that bears persuasive assurances of trustworthiness

St v St George
2002 WI 50
252 Wis. 2d 499
St v Pulizzano
155 Wis. 2d 633 (1990)

6) If proffered evidence is challenged, Def must make 5-part offer of proof to invoke constitutional right to present evidence

   a. Prior acts clearly occurred

   b. Acts closely resemble those of present case

   c. Prior act clearly relevant to material issue

   d. Evidence necessary to Def's case

   e. Probative value of proffered evidence outweighs prejudicial effect

   f. If all above established, Ct must determine whether State's interests in excluding evidence so compelling they overcome Def's right to present evidence

- State's interest in promoting effective law enforcement alone not sufficient to overcome Def's right to present defense
- State's interests to be closely examined and weighed against force of Def's right to present evidence as measured by above five factors

§ 907.02
St v St George
2002 WI 50
252 Wis. 2d 499

7) Expert testimony—Def must satisfy two-part inquiry to establish that exclusion violates right to present a defense

   a. First part—Def must show four factors:
      - Testimony met § 907.02 admissibility standards
      - Expert's testimony clearly relevant to material issue
      - Expert's testimony necessary to Def's case
      - Probative value outweighs prejudicial effect

   b. Second part—Ct must determine whether Def's right to present proffered evidence outweighed by State's compelling interests to exclude evidence

F. Def has right to seek suppression of certain evidence

St v Samuel
2002 WI 34
252 Wis. 2d 26

1) Def has right to challenge voluntariness of witness's prior statement to police

G. Prosecutor may introduce statement or confession of Def

St ex rel Goodchild v Burke
27 Wis. 2d 244 (1965)

1) Provided *Goodchild* hearing requirements met

   a. Hearing held before statement admitted

   b. On record

Recommendation

   c. Motion to suppress not required to trigger *Goodchild* hearing

2) Reversible error if Judge fails to conduct *Goodchild* hearing before Def's statement introduced

3) See **Suppression—Confessions, CR 21**

§ 906.15
Nyberg v St
75 Wis. 2d 400 (1977)

4. Exclusion of Witnesses from Hearing or Trial

A. Matter of right upon request

Fletcher v St
68 Wis. 2d 381 (1975)

B. Ct may order exclusion on own motion

C. Persons exempt from exclusion

Wis Const art. I, § 9m
(Marsy's Law)
§ 950.04(1v)(b)

1) Victim. But see § 906.15(2)(d) regarding exclusion to ensure fair trial

§ 906.15

2) Party who is natural person (e.g., Def)

§ 906.15

3) Officer or employee of party not natural person designated as its representative by its Atty

§ 906.15

4) Person whose presence shown to be essential to presentation of cause, such as

a. Investigator

b. Expert witness who will base own testimony on other evidence in case

- Assertion of essential nature of expert's presence must be based on more than vague generalizations

St v Evans
2000 WI App 178
238 Wis. 2d 411

Nyberg v St
75 Wis. 2d 400 (1977)
Loose v St
120 Wis. 115 (1903)

D. Sanction upon violation of order for exclusion

St v Wright
196 Wis. 2d 149
(Ct. App. 1995)

1) If witness is transgressor and person calling witness innocent of violation, appropriate sanction is contempt against witness

2) If person calling witness participated in violation, Ct may disqualify witness

a. Sufficient to disqualify witness if person had any foreseeable belief that s/he would call witness

St v Green
2002 WI 68
253 Wis. 2d 356
overruled in *part*
on other grds by
St v Johnson
2023 WI 39
407 Wis. 2d 195

3) If no prejudice results from violation

a. Not error to deny motion for mistrial

b. Not error to allow witness to testify

§ 906.15

E. Witnesses may be separated or sequestered during hearing or trial

1) Witness may be required to separate or isolate self from other witnesses and persons interested in trial

2) Sanctions and exemptions same as for exclusion

St v Copeland
2011 WI App 28
332 Wis. 2d 283

3) Ct may, as part of sequestration order, prohibit attorney from sharing testimony of prior witness with a nonparty witness who has not yet testified

5. Compelling Testimony—No 5th Amendment Privilege

§ 885.11(1), (2), (3)

A. Sanctions upon failure to respond to subpoena

1) Recovery of damages

2) Attachment of witnesses

3) Finding of contempt

a. Punishable by fine, and

b. Assessment of all costs related to apprehension of witness

§ 969.01(3)

B. Bail for witness may be required

1) If witness present

a. Must be material witness

b. Must be impractical to secure presence by subpoena

a. Must be material witness

b. Must be impractical to secure presence by subpoena

c. Warrant may issue

3) Upon failure to give bail, witness may be committed to custody of sheriff for up to 15 days to allow deposition to be taken

Peters v St
70 Wis. 2d 22 (1975)

St v Wedgeworth
100 Wis. 2d 514 (1981)

C. Refusal to answer nonincriminatory question

1) Ct may strike witness's direct testimony on following grounds

a. Violative of right of confrontation, or

b. Deprivation of meaningful cross-examination

Ch 785

2) Ct may summarily cite witness for contempt

St v Gonzalez
172 Wis. 2d 576
(Ct. App. 1992)

3) Ct may sanction under § 972.08(2)

6. Compelling Testimony—5th Amendment Privilege

§ 972.08(1)
Wis JI-Cr SM-55

A. General

1) Refusal to testify or to produce documentary evidence

St v McConnohie
121 Wis. 2d 57 (1984)

2) Witness and Ct apprehend danger that such testimony or evidence tends to incriminate witness or subject witness to forfeiture or harsher penalty

St v Marks
194 Wis. 2d 79 (1995)

3) Witness must have real and appreciable apprehension that testimony sought could be used against him/her in criminal proceeding

4) Privilege extends beyond sentencing stage

a. While appeal is pending, or

b. If witness expresses and Ct finds good-faith intention to pursue sentence modification, appeal, or withdraw plea

- Appeal: During time appeal may be taken as of right
- Plea withdrawal: While Def has common-law right (1 year) to withdraw plea
- Sentence modification: if witness shows appreciable chance of success on the motion to modify

St v Lee
88 Wis. 2d 239 (1979)

B. Procedure for compelling testimony—DA gives immunity

§ 972.08(1)

1) Witness must assert privilege against self-incrimination

St v Hall
65 Wis. 2d 18 (1974)

2) Ct must find that

   a. Testimony incriminatory, and

   b. Witness may properly claim privilege

3) Motion by DA to direct witness to answer

4) Ruling by Ct directing witness to answer

   a. Results in automatically vesting witness with immunity

   b. Does not bar prosecution for perjury or false swearing

5) Defense not entitled to request witness immunity

§ 972.08(2)

C. Refusal to answer following grant of immunity

1) Witness may be summarily confined until

   a. Willing to give testimony, or

   b. Until conclusion of trial, but

   c. Confinement cannot exceed one year

2) Witness may not be admitted to bail pending determination of appeal taken from order of confinement

§ 905.13

D. Asserting 5th Amendment privilege—no immunity

§ 905.13(2)

1) Attempt to prevent disclosure to jury of claim of privilege

a. Claim should be made outside presence of jury to extent practicable

St v Heft
185 Wis. 2d 288 (1994)

- Def not denied due process (right to present complete defense) or equal protection when Ct refuses to require witness to assert self-incrimination privilege in front of jury

- Def not denied due process (right to present complete defense) or equal protection when Ct refuses to instruct jury that it may draw inference from 5th Amendment invocation

§ 905.13(1)

b. Neither Judge nor counsel to comment on claim of privilege

§ 905.13(1), (3)

2) If jury learns of privilege claim, it may not draw inference therefrom, and should be so instructed, upon request

St v Nerison
136 Wis. 2d 37 (1987)

7. Plea Bargains and Testimony

A. State may properly offer immunity, lenient treatment, prosecutorial abstinence, or favor to person charged with crime, conditioned on person's full and truthful testimony

B. To be admissible, established safeguards must be followed

1) Full disclosure of plea bargain to jury

2) Opportunity for complete cross-examination

3) Adequate jury instructions

Wis JI-Cr 245

a. Testimony of accomplices

Wis JI-Cr 246

b. Testimony of witness granted immunity

Wis JI-Cr 305

c. *Falsus in Uno*, when appropriate

d. See **Jury Instructions, CR 30**

8. Confrontation

Crawford v Washington
124 S. Ct. 1354 (2004)

A. Ultimate goal of Confrontation Clause is to ensure reliability of evidence against criminal Def by testing in crucible of cross-examination

St v Jenkins
168 Wis. 2d 175
(Ct. App. 1992)

St v McCall
202 Wis. 2d 29 (1996)

B. Criminal Def has same right to confront witnesses under Federal and State Constitutions

1) Right not absolute

a. Testimony Def seeks to elicit must be relevant

b. Ct retains wide latitude to impose reasonable limits on cross-examination (to prevent harassment, confusion, prejudice, etc.)

Maryland v Craig
110 S. Ct. 3157 (1990)
St v Vogelsberg
2006 WI App 228
297 Wis. 2d 519

2) Barrier between Def and witness is not prohibited if Ct finds:

a. Procedure is necessary to protect welfare of child witness;

b. Child would be traumatized by presence of Def;

c. Potential distress to witness would be beyond mere nervousness

C. Analysis

Crawford v Washington
124 S. Ct. 1354 (2004)

1) Confrontation issue presented when *testimonial statement* of person absent from trial is offered. Admissible only if declarant unavailable and Def has had opportunity to cross-examine

St v Hanson
2019 WI 63
387 Wis. 2d 233

a. Testimonial statements allowed if not offered for truth of matter asserted

St v Zamzow
2017 WI 29, ¶ 24
374 Wis. 2d 220

b. Confrontation right applies at trial, not during pretrial proceedings, e.g., suppression motion hearings

c. Exceptions

Giles v California
128 S. Ct. 2678, 2682–83
(2008)
St v Beauchamp
2011 WI 27
333 Wis. 2d 1

- Dying declarations

Giles v California
128 S. Ct. 2678 (2008)

- Forfeiture by wrongdoing

d. Definition of testimonial statements "at a minimum" includes prior testimony at preliminary hearings, before grand jury, at former trial, or during police interrogations

Davis v Washington
126 S. Ct. 2266 (2006)

- Police interrogation

  — Statements are testimonial when circumstances objectively indicate that there is no ongoing emergency and primary purpose of interrogation is to establish or prove past events relevant to later prosecution

See Michigan v Bryant
131 S. Ct. 1143 (2011)
US v Graham
47 F4th 561
(7th Cir 2022)
cert denied
143 S. Ct. 1770 (2023)

  — Statements are nontestimonial when circumstances objectively indicate primary purpose of interrogation is to enable police to assist in ongoing emergency

St v Manuel
2005 WI 75
281 Wis. 2d 554
St v Savanh
2005 WI App 245
287 Wis. 2d 876

e. Definition of testimonial statements—3 formulations of core class:

- Ex parte in-Ct testimony or its functional equivalent, such as affidavits, custodial examinations, prior testimony when Def cross-examined, or similar pretrial statements that declarant would reasonably expect to be used prosecutorially;

- Extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and

St v Doss
2008 WI 93
312 Wis. 2d 570

— Affidavits authenticating bank records are nontestimonial

- Statements made under circumstances that would lead an objective witness to reasonably believe that the statement would be available for use later at a trial

— Statements made between co-conspirators in the course of an undercover investigation are not testimonial

St v Rodriguez
2006 WI App 163
295 Wis. 2d 801
remanded (Wis 4/17/07)

— Out-of-court declaration is testimonial if overtly or covertly intended to implicate Def in Ct, rather than "stress-generated" to get help or secure safety and thus devoid of possible fabrication

St v Keller
2021 WI App 22
397 Wis. 2d 122

— Confidential reporter statement to social worker not testimonial

St v Ramirez
2023 WI App 63
410 Wis. 2d 224
pet for rev filed

— Statements made for the primary purpose of facilitating medical care were not testimonial

St v Jensen
2021 WI 27
396 Wis. 2d 196

— Statements by homicide victim to accuse Def in the event she died were testimonial

St v Hale
2005 WI 7
277 Wis. 2d 593

f. "Confrontation by proxy" (cross-examination at Co-Def's trial) will not satisfy Confrontation Clause

St v Stuart
2005 WI 47
279 Wis. 2d 659

St v Morales-Pedrosa
2016 WI App 38, ¶¶ 31–41, 369 Wis. 2d 75

g. Limited cross-examination at preliminary hearing is insufficient to satisfy Confrontation Clause

h. Prior testimonial statements admissible if declarant was subjected to full cross-examination at trial

St v Tomlinson
2002 WI 91
254 Wis. 2d 502
St v Marks
194 Wis. 2d 79 (1995)

2) If confrontation issue is presented, regarding nontestimonial, out-of-Ct statement admissible as either nonhearsay or under recognized hearsay exception, then

Ohio v Roberts
100 S. Ct. 2531 (1980)
St v Patino
177 Wis. 2d 348
(Ct. App. 1993)

a. Prosecution must establish unavailability of declarant, and

St v Jackson
187 Wis. 2d 431
(Ct. App. 1994)

b. Indicia of reliability of the hearsay statement (particularized guarantees of trustworthiness), OR statement "falls within a firmly rooted hearsay exception"

White v Illinois
112 S. Ct. 736 (1992)
St v Hickman
182 Wis. 2d 318
(Ct. App. 1994)

- A statement so trustworthy that adversarial testing can be expected to add little to its reliability

- Held "firmly rooted"

St v Patino
177 Wis. 2d 348
(Ct. App. 1993)

— Personal admissions by party opponent under § 908.01(4)(b)1.

St v Marshall
113 Wis. 2d 643 (1983)

— Adoptive admission under § 908.01(4)(b)2.

Bourjaily v US
107 S. Ct. 2775 (1987)
St v Ray
166 Wis. 2d 855
(Ct. App. 1992)

— Co-conspirator exception under § 908.01(4)(b)5.

White v Illinois
112 S. Ct. 736 (1992)
St v Martinez
150 Wis. 2d 62 (1989)

— Excited utterance exception under § 908.03(2)

St v Jackson
187 Wis. 2d 431
(Ct. App. 1994)

— Existing mental, emotional or physical condition (state-of-mind) exception under § 908.03(3)

St v Rundle
166 Wis. 2d 715
(Ct. App. 1992)

— Medical examination exception under § 908.03(4)

St v Jenkins
168 Wis. 2d 175
(Ct. App. 1992)

— Past-recollection-recorded exception under § 908.03(5)

St v Bauer
109 Wis. 2d 204 (1982)
St v Hickman
182 Wis. 2d 318
(Ct. App. 1994)

— Former testimony exception under § 908.045(1)

St v Denny
163 Wis. 2d 352
(Ct. App. 1991)
St v Buelow
122 Wis. 2d 465
(Ct. App. 1984)
cf St v Guerard
2004 WI 85
273 Wis. 2d 250

— Statement against penal or social interest under § 908.045(4). CAUTION: Is portion of statement implicating Def truly against *declarant's* interests?

St v Hickman
182 Wis. 2d 318
(Ct. App. 1994)

c. If declarant unavailable and statement either shown to be reliable or falls within a well-recognized exception, Ct must then examine case to determine whether unusual circumstances warrant exclusion

St v Petrovic
224 Wis. 2d 477
(Ct. App. 1999)

d. When statement is admissible under residual hearsay exception, Ct must look to showing of particularized guarantees of trustworthiness

St v Murillo
2001 WI App 11
240 Wis. 2d 666

- Social interest exception

- Residual hearsay exception not a firmly rooted exception for Confrontation Clause purposes

- Spontaneity, consistent repetition, mental state, terminology used, motive to fabricate, indicia of reliability shown through other factors

Bruton v US
88 S. Ct. 1620 (1968)
St v Mayhall
195 Wis. 2d 53
(Ct. App. 1995)

D. Co-defendant's confession

1) Confrontation Clause violated when nontestifying co-Def's confession incriminating another co-Def in the crime is introduced at their joint trial

St v Nieves
2017 WI 69, ¶ 35
376 Wis. 2d 300

a. *Bruton* applies only to statements that are testimonial; nontestimonial statements, such as statements made to jailhouse informants, are not barred

b. Limiting instruction does not cure violation

2) Confrontation Clause not violated if co-Def's confession is redacted to omit any reference to the Def's existence

Samia v United States
143 S. Ct. 2004 (2023)
Wis JI-Cr 221

a. If Def is nonetheless linked to co-Def's redacted confession by other properly admitted evidence, Ct must give limiting instruction

E. Forensic reports

Bullcoming v New Mexico
131 S. Ct. 2705, 2716–17 (2011)

1) Reports created for use in prosecution or police investigation are testimonial, and therefore confrontation right applies

St v Thomas
2023 WI 9
405 Wis. 2d 654

2) Testimonial report (if not in evidence) on which expert relies is not admissible by State for truth of the matter asserted. (Defense may request a limiting instruction to this end.) Improper admission of report is reviewed under a harmless-error standard

St v Mattox
2017 WI 9, ¶ 3
373 Wis. 2d 122

NOTE: Crime lab reports are usually for evidentiary purposes and therefore testimonial.

St v Nelson
2021 WI App 2, ¶¶ 27–45
395 Wis. 2d 585

3) Nurse report from Child Advocacy Center written for treatment purposes not testimonial

F. Depositions

1) See **CR 11**

§ 908.08

9. Child's and Child-Victim's Statements

A. Audiovisual recordings of statements of children (not audiovisually recorded depositions)

St v Tarantino
157 Wis. 2d 199
(Ct. App. 1990)

1) Audiovisually recorded statements of children are additional exception to hearsay rule if taken pursuant to § 908.08

a. Statute incorporates opportunity for confrontation and is therefore constitutional

St v Williquette
180 Wis. 2d 589
(Ct. App. 1993)
aff'd on other grounds
190 Wis. 2d 677 (1995)

b. Purpose of statute is to permit evidentiary use of audiovisual recordings of children if safeguards are followed

St v Mercado
2021 WI 2
395 Wis. 2d 296

c. Findings must be made before ruling on admissibility, but Ct need not review entire recording

2) Requirements for admission

§ 908.08(3)(c)
St v Jimmie RR
2000 WI App 5
232 Wis. 2d 138

a. Statement made on oath or affirmation; if child's developmental level too limited, upon child's understanding that false statements punishable and of importance of telling truth

§ 908.08(3)(b)

b. Audiovisual recording must be accurate and free from excision, alteration, and distortion

§ 908.08(3)(a)

c. Child must be younger than 12

§ 908.08(4)

3) If child at least 12 but younger than 16, interest of justice must warrant admission of audiovisual recording, considering

a. Chronological age, level of development, and capacity to comprehend significance of events and to verbalize about them

b. Child's general physical and mental health

c. Whether events involved constituted criminal or antisocial conduct against child

d. Whether person involved was person with whom child has close emotional relationship

e. If conduct constituted battery or sexual assault, duration of assault and extent of physical or emotional injury caused thereby

f. Attitude of other household members to events and to underlying proceeding

g. Child's custodial situation

h. Child's familial or emotional relationship to those involved in proceeding

i. Child's behavior at and reaction to previous interviews regarding events

j. Whether child blames self for events or has been told by others not to disclose them

k. Whether child's prior reports to associates or authorities have been disbelieved or not acted upon

l. Child's subjective belief regarding consequences to self or person child emotionally close to

m. Any manifestations associated with post-traumatic stress disorder or other mental disorders

n. Whether admission of audiovisual recording would reduce mental or emotional strain of testifying or reduce number of times child needs to testify

§ 908.08(5)(a)

4) If audiovisually recorded statement admitted at other than prelim

a. Party offering statement may call child to testify immediately after statement shown to trier of fact; or

b. Upon request of any other party, Ct shall order child produced immediately for cross-examination

§ 908.01
St v Lomprey
173 Wis. 2d 209, 215
(Ct. App. 1992)

c. Child's videotaped nonverbal conduct may be "in-court testimony" if Ct finds such conduct intended as an assertion

d. Lack of cross-examination does not affect admissibility of child's testimonial conduct at trial

St v Marks
2022 WI App 20
402 Wis. 2d 285
pet for rev denied

e. Recording may be result of merging of video and audio as long as § 908.08 requirements met

§ 908.08(5)(b)

5) Judge may not order child to appear for cross-examination at prelim upon failure of party who offers audiovisually recorded statement to call child to testify

St v Ruiz-Velez
2008 WI App 169
314 Wis. 2d 724

6) Recording must be transcribed by official Ct reporter

§ 908.03(2)

B. Admissibility of child-victim's statements under excited utterance exception

St v Sorenson
143 Wis. 2d 226 (1988)
St v Gerald LC
194 Wis. 2d 548
(Ct. App. 1995)

1) Statement relating to a startling event or condition made while declarant was under the stress of excitement caused by the event or condition

St v Huntington
216 Wis. 2d 671 (1998)

2) Primary factors

   a. Age of child

   b. Contemporaneity, as measured by duration of the stress or nervous shock acting on declarant at the time of the statement

   c. Spontaneity, i.e., opportunity and capacity to review the event and to calculate the effect of child's statements

   d. To whom reported (usually to mother)

3) Rule is liberally applied in cases involving child-victim declarant

   a. General psychological characteristics of children typically extend the period of time that is free from the dangers of conscious fabrication

   b. Young children will tend to repress the stressful incident

§ 908.03(24), § 908.045(6)
St v Petrovic
224 Wis. 2d 477
(Ct. App. 1999)
St v Kevin LC
216 Wis. 2d 166
(Ct. App. 1997)

C. Admissibility of child-victim's statements under residual hearsay exception

1) Issue: Trustworthiness of the statement

St v Mercado
2021 WI 2
395 Wis. 2d 296
St v Sorenson
143 Wis. 2d 226 (1988)

2) Factors to consider: Totality of circumstances test

a. Attributes of child: Age, ability to communicate, to comprehend statements/questions of others; to know difference between truth/falsehood; any fear of punishment, retribution, or other personal interest, such as relationship with Def, which might affect motivation to tell truth

b. Person to whom statement made: Relationship to child and impact of relationship; any motivation of recipient to falsify or distort child's statement

c. Circumstances under which statement made: Relation to time of alleged assault; availability of person in whom child might confide; and other contextual facts enhancing or detracting from statement's trustworthiness

d. Content of statement: Signs of deceit or falsity; whether statement reveals knowledge of matters not ordinarily attributable to child of similar age

e. Other corroborating evidence: Physical evidence of assault; statements made to others; comparison of statement to opportunity and motive of Def

St v Gerald LC
194 Wis. 2d 548
(Ct. App. 1995)

3) No single factor dispositive—Ct must evaluate force of all factors

Idaho v Wright
110 S. Ct. 3139 (1990)
St v Lomprey
173 Wis. 2d 209
(Ct. App. 1992)

4) If confrontation right exists (e.g., at trial), evidence must possess indicia of reliability by virtue of inherent trustworthiness. May NOT take into account other evidence at trial that corroborates truth of hearsay statement

a. Confrontation Clause requires exclusion of out-of-court statement unless affirmative reason, arising from circumstances in which statement made, rebuts presumption that hearsay statement is not worthy of reliance at trial

b. Test: Whether child declarant was particularly likely to be telling truth when statement made

c. Factors: Spontaneity, consistent repetition, use of terminology unexpected of child of similar age, lack of motive to fabricate, and similar factors

§ 908.03(4)

D. Admissibility of statements under medical diagnosis or treatment exception

St v Huntington
216 Wis. 2d 671 (1998)

1) Statements made by child-victim's mother to nurse practitioner investigating alleged abuse, although double hearsay, are properly admitted as falling within the medical diagnosis or treatment exception

10. Use of Former Testimony

St v Wyss
124 Wis. 2d 681 (1985)

A. Two tests must be met to allow use of witness's former testimony

1) Witness must be unavailable

§ 908.04(1)(e)

a. Prosecution must make good-faith effort to obtain attendance at trial, or

St v Burns
112 Wis. 2d 131 (1983)

b. Witness dead or suffering from physical or mental illness or infirmity

2) Evidence must bear some indicia of reliability

11. Out-of-Court Translators

St v Patino
177 Wis. 2d 348
(Ct. App. 1993)

A. If no indication of inaccuracy, translator is considered a conduit for communication—translator's statements are those of the speakers—and thus translator need not be a witness

1) Statement made to translator does not create additional layer of hearsay

2) Rule applies to translations by parties and witnesses

3) The out-of-court, translated statements must be admissible under an exception to the hearsay rule

Recommendation
§ 901.04(3)(d)

B. Ct should conduct hearing out of presence of jury to determine whether opponent can show

1) Translator had motive to mislead or distort

2) Translation was inaccurate

12. Privileges

St v Joseph P (Int of Joy P)
200 Wis. 2d 227
(Ct. App. 1996)

A. For privilege to apply, communication must be confidential

1) Holder's belief in communication's confidentiality must be "objectively reasonable"

2) That service provider shares communications for privileged purpose does not affect confidentiality

B. Selected privileges (*see* Ch 905)

§ 905.03

1) Atty-client

Journal/Sentinel, Inc v Sch Bd
186 Wis. 2d 443
(Ct. App. 1994)

a. Applies to confidential communications from client to lawyer, not vice versa, unless latter would reveal substance of client's confidential communication

Borgwardt v Redlin
196 Wis. 2d 342
(Ct. App. 1995)

b. Only client, as "holder" of privilege, or someone authorized by client, may waive

§ 905.03(4)(c)
St v Simpson
200 Wis. 2d 798
(Ct. App. 1996)

c. Privilege is absolute unless § 905.03(4) exception applies or voluntarily waived

St v Meeks
2003 WI 104
263 Wis. 2d 794

d. Party asserting privilege bears burden to establish that privilege applies

St v Boyd
2011 WI App 25, ¶ 21
331 Wis. 2d 697

e. Privilege is waived when Def claims he or she cannot effectively communicate with Atty

§ 905.04

2) Physician-patient privilege

a. A patient has a privilege to prevent a physician from testifying

b. Selected exceptions

§ 905.04(4)(c)
Winnebago Cty DSS v Harold W (Gdnship of Tina Marie W)
215 Wis. 2d 523
(Ct. App. 1997)

- When patient's physical, mental, or emotional condition is element of patient's defense, if limited in scope to nature of such defense

§ 905.04(4)(d)

- Homicide trials, when disclosure relates directly to circumstances of the homicide

§ 905.04(4)(f)

- Chemical tests for intoxication

§ 905.04(4)(a)
St v Post
197 Wis. 2d 279 (1995)
St v Zanelli
212 Wis. 2d 358
(Ct. App. 1997)

- Evidence regarding alleged sexually violent person's (sexual predator's) psychiatric condition offered in Ch 980 commitment or discharge hearing

§ 905.10

3) Confidential informant

   a. *See* **CR 10, Sec. 4.D.**

§ 905.05

4) Spousal and domestic partnership privilege

§ 905.05(3)
St v Richard GB
2003 WI App 13
259 Wis. 2d 730

   a. No privilege when one spouse is charged with crime against third person in course of committing crime against other spouse

St v Eison
2011 WI App 52, ¶¶ 23–34, 332 Wis. 2d 331

   b. Spouses' recorded conversations from jail not a "private communication"; therefore, not privileged

§ 942.01(3)
St v Cardenas-Hernandez
219 Wis. 2d 516 (1998)

C. Statements made by Def at John Doe proceeding are absolutely privileged under § 942.01(3), even if perjurious

St v Migliorino
170 Wis. 2d 576
(Ct. App. 1992)

D. Cannot create testimonial privileges by judicial decision

St v McConnohie
121 Wis. 2d 57 (1984)
St v Whitaker
167 Wis. 2d 247
(Ct. App. 1992)

E. Potential witness's right against self-incrimination defeats Def's right to compulsory process

§ 905.11
St v Speese
191 Wis. 2d 205
(Ct. App. 1995)
rev'd on other grounds
199 Wis. 2d 597 (1996)

F. Privilege is waived if the holder voluntarily discloses or consents to disclosure of the confidential matter or communication or any significant part thereof

13. Rape Shield Statute: § 972.11

A. Prior sexual conduct

§ 972.11(2)(b)
St v Hammer
2000 WI 92
236 Wis. 2d 686
St v Jackson
216 Wis. 2d 646 (1998)

1) In sexual assault prosecution, evidence concerning complainant's prior sexual conduct (including absence of sexual activity) or reputation not admissible unless statutory or judicially created exception

St v Wirts
176 Wis. 2d 174
(Ct. App. 1993)

a. "Prior sexual conduct" means conduct before conclusion of trial, not before alleged crime

St v Mulhern
2022 WI 42
402 Wis. 2d 64
Michael RB v St
(In Int of Michael RB)
175 Wis. 2d 713 (1993)

b. Exclusion applies to evidence showing absence of sexual activity as well, even if offered to refute defense that vaginal DNA evidence belonged to another perpetrator

B. Exceptions—Statutory

§ 972.11(2)(b)1.

1) Complainant's past conduct with Def—to be admissible,

St v Sarfraz
2014 WI 78
356 Wis. 2d 460

a. Evidence must be material to a fact at issue, and

b. Evidence of the sexual contact must be of sufficient probative value to outweigh its prejudicial effect

§ 972.11(2)(b)2.

2) Specific instances of sexual conduct showing source or origin of semen, pregnancy, or disease to show

a. Degree of sexual assault

b. Extent of injury suffered

- Enlarged hymenal opening not a disease

Michael RB v St
(In Int of Michael RB)
175 Wis. 2d 713 (1993)

§ 972.11(2)(b)3.
St v Ringer
2010 WI 69, ¶¶ 30–31
326 Wis. 2d 351

3) Complainant's prior untruthful accusation of sexual assault

a. Def should make pretrial offer of proof

b. Def has burden to prove proffered evidence such that jury could reasonably find complainant made prior untruthful allegation

Michael RB v St
(In Int of Michael RB)
175 Wis. 2d 713 (1993)

4) Legislature's adoption of § 972.11(2)(c) mandates restricted interpretation of § 972.11(2)(b). Sec. 972.11(2)(c) "absolutely" prohibits Ct from expanding scope of statute's listed exceptions

a. Rule of § 901.06 that evidence inadmissible for one purpose may be admissible for another NOT applicable to rape shield statutory exclusions

St v Dunlap
2002 WI 19
250 Wis. 2d 466

St v Burns
2011 WI 22, ¶ 35
332 Wis. 2d 730
St v Pulizzano
155 Wis. 2d 633 (1990)

C. Exceptions—Constitutional

1) To establish constitutional right to present evidence, offer of proof must meet five tests

   a. Prior acts clearly occurred

   b. Acts closely resembled those of present case

   c. Prior act is clearly relevant to a material issue

   d. Evidence is necessary to Def's case

   e. Probative value of evidence outweighs its prejudicial effect

Michael RB v St
(In Int of Michael RB)
175 Wis. 2d 713 (1993)
St v Moats
156 Wis. 2d 74 (1990)
St v Pulizzano
155 Wis. 2d 633 (1990)

2) Right to present defense and cross-examine

St v Carter
2010 WI 40
324 Wis. 2d 640

   a. Evidence of prior sexual assaults to establish alternative source for complainant's knowledge or injury

St v Dunlap
2002 WI 19
250 Wis. 2d 466
St v Gavigan
111 Wis. 2d 150 (1983)

   b. Evidence of prior sexual conduct

St v Jagielski
161 Wis. 2d 67
(Ct. App. 1991)

- Evidence must serve to prove relevant fact independent of complainant's prior sexual conduct
- Probative value of evidence must outweigh prejudice caused by its relation to complainant's prior conduct
- If requested, Ct must give limiting instruction regarding purpose for which evidence was admitted
  - — Instruct jury that evidence CANNOT be considered as indicating complainant's prior sexual conduct

Recommendation

St v Pulizzano
155 Wis. 2d 633 (1990)

3) Confrontation

St v Herndon
145 Wis. 2d 91
(Ct. App. 1987)
overruled on other grounds by
St v Pulizzano
155 Wis. 2d 633 (1990)

a. Evidence of complainant's motive to fabricate (limited)

St v Gulrud
140 Wis. 2d 721
(Ct. App. 1987)
as interpreted in
St v Wirts
176 Wis. 2d 174
(Ct. App. 1993)

b. Evidence of post-assault intercourse to show someone else caused the injury

c. Rebuttal of evidence produced by State to corroborate assault allegation

St v Pulizzano
155 Wis. 2d 633 (1990)

4) Compulsory process rights (limited)

a. *See* **Sec. 3, Compulsory Process/Right to Present a Defense**, above

D. Other exceptions

St v Vonesh
135 Wis. 2d 477
(Ct. App. 1986)

1) Future conduct or behavior

2) Writings about sexual desires or activities

St v Rognrud
156 Wis. 2d 783
(Ct. App. 1990)

3) Evidence that complainant falsely accused third party of assaulting another

Michael RB v St
(In Int of Michael RB)
175 Wis. 2d 713 (1993)

4) Third party's personal sexual experiences told to the victim

5) Expert evidence to show or rebut that victim's physical condition consistent with vaginal penetration

§ 972.11(2)(d)

E. Manner of dress

1) In sexual assault prosecution, evidence of complaining witness's manner of dress is admissible only if

a. Relevant to a contested issue, and

b. Probative value substantially outweighs the following

- Danger of unfair prejudice, confusion of the issues, or misleading the jury
- Considerations of undue delay, waste of time, or needless presentation of cumulative evidence

2) Ct must determine admissibility of "manner of dress" evidence upon pretrial motion

§ 972.11(2)(b)
St v Moats
156 Wis. 2d 74 (1990)

F. Pretrial determination of applicability of § 971.31(11) exception and admissibility required

1) In general

Michael RB v St
(In Int of Michael RB)
175 Wis. 2d 713 (1993)

a. Proponent of evidence must make offer of proof

b. Question-and-answer format preferred over offer of proof made in statement form

2) Statutory exceptions—Ct must determine

St v DeSantis
155 Wis. 2d 774 (1990)

a. Whether proffered evidence fits within statutory provisions

St v Ringer
2010 WI 69, ¶¶ 30–31
326 Wis. 2d 351

- Sec. 972.11(2)(b)3.; Ct must conclude that a reasonable person could reasonably find that complainant made a prior untruthful sexual assault allegation

b. Whether evidence material to fact at issue

c. Whether evidence of sufficient probative value to outweigh its inflammatory and prejudicial nature

St v Jagielski
161 Wis. 2d 67
(Ct. App. 1991)

3) Constitutional exceptions

St v Pulizzano
155 Wis. 2d 633 (1990)

a. If above criteria in **Sec. 13.C.1)** met, Judge determines whether compelling State interest requires exclusion

- State's interest in promoting effective law enforcement not sufficient to overcome Def's constitutional right to present evidence
- State's interest in its evidentiary rules does not overcome Def's right to present evidence and to effectively cross-examine
- State's interest not sufficient when there are other less restrictive alternatives available to protect those interests

St v Foy
206 Wis. 2d 629
(Ct. App. 1996)

14. Attorney as Witness

A. Attys are competent to testify

B. Trial Ct has discretion to allow advocate to testify in client's case

1) No general prohibition under rules of evidence against Atty testifying for client

2) Ct, however, should not usually permit Atty who is advocate in a trial to testify in that trial, especially when value of testimony is small or collateral to ultimate issues

SCR 20:3.7

a. Ethical prohibition against Atty testifying for client unless

- Testimony relates to uncontested issue
- Testimony relates to nature and value of legal services
- Disqualification of lawyer would work substantial hardship on client

b. Ethical prohibition is not absolute rule and Ct may permit Atty to testify when justice requires

- Ct should balance client's interest in continuing to be represented by same Atty against prejudice to opposing party if Atty acts in both roles

- Opposing party may be prejudiced if Ct does not assure that Atty-witness gives evidence and not an analysis of the evidence
- Ct may consider
  - — Nature and significance of proposed testimony
  - — Whether Atty knew ahead of time that the testimony would be necessary
  - — What caused the need for the testimony
  - — Whether opposing party opened the door to a matter to which it was clear opposing counsel was an eyewitness

c. Ct has option of permitting Atty to withdraw and declare mistrial, with substitute counsel representing client at new trial

3) If factors favor permitting Atty to testify, Ct must weigh them against the alternatives available

a. Proceed with trial and allow Atty to testify

- Consider the awkwardness and potential confusion to the jury, or

b. Grant mistrial so that new Atty may appear

- Consider delay and inconvenience of a continuance
- *See* **CR 35, Mistrial**

St v McDowell
2004 WI 70
272 Wis. 2d 488

15. Defendant Perjury

A. Counsel's role

1) Dissuade client

2) Seriously consider withdrawal

3) Permit Def's testimony in narrative, but only after informing Def, opposing counsel, and Ct

B. Ct's role

1) Shall be required to examine both counsel and Def and make record of following:

a. Basis for counsel's conclusion that Def intends to testify falsely;

b. Def's understanding of right to testify, notwithstanding the intent to testify falsely; and

c. Def's and counsel's understanding of nature and limitations of narrative questioning that will result

St v Sandoval
2009 WI App 61, ¶ 30
318 Wis. 2d 126

16. Rebuttal Witness

§ 971.23(1)(d)

A. No duty to disclose

1) No duty to disclose names or statements of rebuttal witnesses if they are bona fide rebuttal witnesses

2) Test of admissibility is whether it only became necessary and appropriate when opposing party presented his or her case-in-reply

St v Novy
2013 WI 23
346 Wis. 2d 289

B. Evidence ruled inadmissible in case-in-chief may be admissible for rebuttal

CR 27: EXPERT WITNESSES

1. Expert Witnesses ..... CR 27-1
2. Opinion Concerning Witness's Credibility or State of Mind ..... CR 27-7
3. Expert Testimony on Capacity to Form Intent ..... CR 27-10
4. Expert Testimony on Intoxication ..... CR 27-10
5. Expert Testimony on Post-assault Conduct ..... CR 27-11
6. Expert Testimony on Character ..... CR 27-12
7. Procedure If Challenge Raised ..... CR 27-12

1. Expert Witnesses

§ 907.02(1)

A. Witness qualified by

1) Knowledge,

2) Skill,

3) Experience,

4) Training, or

5) Education

§ 907.02
St v Kandutsch
2011 WI 78, ¶¶ 26–45
336 Wis. 2d 478
St v Shomberg
2006 WI 9, ¶ 10
288 Wis. 2d 1
St v St George
2002 WI 50, ¶ 37
252 Wis. 2d 499

B. Permitted if

St v Maday
2017 WI 28, ¶ 40
374 Wis. 2d 164

1) Expert testimony will assist trier of fact in understanding evidence, and

2) Expert testimony will assist in determining a fact in issue, and

St v Perkins
2004 WI App 213
277 Wis. 2d 243

3) Testimony deals with matters beyond realm of ordinary experience and knowledge of humankind

St v Hollingsworth
160 Wis. 2d 883
(Ct. App. 1991)

a. Question is does witness know something beyond that generally known in community

St v Watson
227 Wis. 2d 167 (1999)

b. The fact that a lay witness of ordinary intelligence may also understand subject matter does not require exclusion

St v St George
2002 WI 50, ¶¶ 53–55
252 Wis. 2d 499

4) Def establishes a constitutional right to admissibility of the evidence and satisfies a two-part test

a. Satisfies each of the following four factors:

- Expert testimony meets standard of § 907.02
- Expert testimony clearly relevant to a material issue
- Expert's testimony is necessary to the Def's case
- Probative value outweighs prejudice

St v Fischer
2008 WI App 152, ¶¶ 21–24, 314 Wis. 2d 324
aff'd, 2010 WI 6
322 Wis. 2d 265

b. Def's right to present evidence is not outweighed by State's compelling interest to exclude it

§ 907.02
Daubert v Merrell Dow Pharm
113 S. Ct. 2786 (1993)
St v Alger
2015 WI 3, ¶ 4
360 Wis. 2d 193
St v Peters
192 Wis. 2d 674
(Ct. App. 1995)

C. Beginning with actions or special proceedings commenced on or after February 1, 2011, Wisconsin uses "reliability (*Daubert*) test"; pre-February 1, 2011, Wisconsin uses "relevancy test"

§ 907.02(1)
Daubert v Merrell Dow Pharm
113 S. Ct. 2786 (1993)

1) Expert testimony admissible if

a. It is based on sufficient facts or data

b. It is the product of reliable principles and methods

c. Witness has applied the principles and methods reliably to the facts of the case

Kumho Tire Co v Carmichael
119 S. Ct. 1167, 1174 (1999)
St v Jones
2018 WI 44, ¶ 32
381 Wis. 2d 284

2) Ct has discretion in fulfilling gatekeeping duties under *Daubert* to determine whether the proffered expert's scientific, technical, or other specialized knowledge makes a fact of consequence more probable or not, and, further, whether the evidence is reliable enough to go to the fact-finder

St v Cameron
2016 WI App 54, ¶ 13
370 Wis. 2d 661

US v John
597 F3d 263, 274–75
(5th Cir 2010)
St v Schmidt
2016 WI App 45, ¶ 70
370 Wis. 2d 139

St v Dobbs
2020 WI 64, ¶ 42
392 Wis. 2d 505

a. If no objection, Trial Ct not required to sua sponte conduct a *Daubert* hearing

b. Ct may conduct pretrial hearing to determine admissibility, but if expert methodology is generally accepted and novel issues are not presented, *Daubert* hearing may not be necessary

c. Experts can testify in form of an opinion "or otherwise," including exposition testimony on general principles without applying those principles to or having knowledge of the case facts

§ 907.02(1)
St v Jones
2018 WI 44, ¶¶ 29–30
381 Wis. 2d 284
St v Bucki
2020 WI App 43, ¶¶ 45–46, 51, 393 Wis. 2d 434
(cadaver-scent dog)

d. Ct acting as gatekeeper shall apply these factors:

- Whether the scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue;
- Whether the expert is qualified as an expert by knowledge, skill, experience, training, or education;
- Whether the testimony is based on sufficient facts or data;
- Whether the testimony is the product of reliable principles and methods; and
- Whether the witness has applied the principles and methods reliably to the facts of the case

St v Hogan
2021 WI App 24, ¶ 25
397 Wis. 2d 171

Daubert v
Merrell Dow Pharm, Inc
113 S. Ct. 2786, 2796–97
(1993)

e. Ct also may apply these factors if scientific evidence is proffered:

- Whether a "theory or technique ... can be (and has been) tested"
- Whether it "has been subjected to peer review and publication"

- Whether, in respect to a particular technique, there is a high "known or potential rate of error"
- Whether there are "standards controlling the technique's operation"
- Whether the theory or technique enjoys "general acceptance" within a "relevant scientific community"

St v Smith
2016 WI App 8, ¶ 9
366 Wis. 2d 613

f. Other factors may be determinative of reliability

Seifert v Balink
2017 WI 2
372 Wis. 2d 525

- If medical testimony is proffered, consider the factors discussed in *Seifert*

§ 907.03
St v Thomas
2023 WI 9
405 Wis. 2d 654

D. Basis of opinion

1) Firsthand observation made by expert (e.g., treating physician testifying regarding patient), or

2) Evidence presented at trial, or

3) Data presented to expert outside of trial

St v Swope
2008 WI App 175, ¶ 34
315 Wis. 2d 120

4) Underlying basis for opinion need not be admissible if of type reasonably relied on by experts in particular field

St v Harrell
2008 WI App 37, ¶¶ 22–24, 308 Wis. 2d 166

a. Exception if underlying basis is testimonial, compelled, and incriminating statement in violation of 5th Amendment

St v Thomas
2023 WI 9
405 Wis. 2d 654
See Williams v Illinois
132 S. Ct. 2221 (2012)
St v Deadwiller
2013 WI 75, ¶¶ 39–40
350 Wis. 2d 138

b. Out-of-court statements (in a lab report) related by an expert solely for the purpose of explaining the assumptions on which the expert's opinion rests are testimonial and fall within the scope of the Confrontation Clause

§ 907.03

5) Beginning with cases filed on or after February 1, 2011, facts or data otherwise inadmissible may not be disclosed to the jury by the proponent unless the Ct determines that their probative value substantially outweighs their prejudicial effect

6) Basis for independent opinion may be the work of others:

St v Griep
2015 WI 40, ¶ 57
361 Wis. 2d 657 (BAC)
St v Deadwiller
2013 WI 75, ¶¶ 39–40
350 Wis. 2d 138 (sexual assault DNA profile)
St v Williams
2002 WI 58, ¶ 20
253 Wis. 2d 99 (drug ID)

a. If witness supervised or reviewed work of others and is familiar with the procedures the others used

St v Mattox
2017 WI 9, ¶ 40
373 Wis. 2d 122 (autopsy toxicology report)

b. If obtained without law enforcement request

E. Soundness of opinion

Pucci v Rausch
51 Wis. 2d 513, 519 (1971)

1) Opinions must be stated to reasonable professional (medical, engineering, etc.) probability

Drexler v All Am Life & Cas Co
72 Wis. 2d 420 (1976)

a. No particular words of art required: "I feel," "I believe," "likely," etc. may be sufficient

Drexler v All Am Life & Cas Co
72 Wis. 2d 420 (1976)
Unruh v Ind Comm'n
8 Wis. 2d 394 (1959)

b. Test: Under reasonable interpretation of meaning or sense in which the words are used, is witness expressing an expert opinion

McGarrity v Welch Plumbing Co
104 Wis. 2d 414, 430 (1981)

2) Mere possibility or conjecture insufficient

§ 907.05

F. Underlying data

1) Expert may testify as to opinion without prior disclosure of underlying facts or data, unless

a. Ct directs otherwise, or

Karl v Employers Ins of Wausau
78 Wis. 2d 284 (1977)

b. Cross-examination inquires about underlying data

Rabata v Dohner
45 Wis. 2d 111 (1969)

2) Hypothetical question not required

Schulz v St Mary's Hosp
81 Wis. 2d 638 (1978)

3) If hypothetical question used

a. Must be based on assumptions that have support in evidence

b. If no basis for question exists in evidence, question and answer subject to motion to strike

§ 907.07

G. Use of reports at trial

1) Expert may read report personally made or jointly made with another to same extent as contents could be received as oral testimony from witness

2) Before use, copy must be provided to opposing party

H. Cross-examination of expert at trial

1) Within discretion of court as to character issues not directly related to expert opinion or underlying basis for opinion

St v Lindh
161 Wis. 2d 324 (1991)

2) Expert witness with ongoing "dual relationship" with prosecutors (e.g., on probation or acting under plea agreement while offering expert opinion testimony for State) may be cross-examined on nature of relationship

a. Possibility of bias, motive, and interest of expert witness is distinct and immediate in such circumstances

I. Payment of expert/investigator fees—Def eligible for SPD

Polk Cty v SPD
179 Wis. 2d 312
(Ct. App. 1993)
aff'd on other grounds
188 Wis. 2d 665 (1994)

1) SPD pays fees of experts if

a. Expert is engaged by SPD

§ 977.05(4r)
Brown Cty DSS v Lydia EC (In Int of Eileen KC)
172 Wis. 2d 512
(Ct. App. 1992)

b. Expert is engaged by SPD-appointed private Atty, and

- Atty follows SPD guidelines for reimbursement (prior approval and maximum reimbursement limit)
  - — Unless Ct must exercise its inherent powers because of an extraordinary circumstance
- Use of expert found to be essential to defense

J. Payment of expert/investigator fees—Def indigent but not eligible for SPD

St v Kirschbaum
195 Wis. 2d 11
(Ct. App. 1995)

1) Indigent Def has constitutional right to State's assistance in securing raw materials for effective defense

§ 885.10
Taylor v Illinois
108 S. Ct. 646 (1988)
St ex rel Dressler v Cir Ct
163 Wis. 2d 622
(Ct. App. 1991)

2) Indigent Def has constitutional right to have assistance of Trial Ct to compel attendance of witnesses and the right to put before jury evidence that might influence determination of guilt

a. Not an unfettered right, but subject to Ct's discretion upon finding that witness is proper and necessary

Taylor v Illinois
108 S. Ct. 646 (1988)

b. Def must make a plausible showing of a particularized need
   - How proposed witness is material, and
   - How proposed witness is favorable to his or her defense

2. Opinion Concerning Witness's Credibility or State of Mind

St v Huntington
216 Wis. 2d 671 (1998)
St v Romero
147 Wis. 2d 264 (1988)

A. No witness, expert or otherwise, should be permitted to give opinion that another mentally and physically competent witness is telling the truth

St v Kuehl
199 Wis. 2d 143
(Ct. App. 1995)

1) Basis of rule is lack of foundation or knowledge on which to premise belief as to another's truthfulness

St v Pittman
174 Wis. 2d 255 (1993)

2) Expert testimony that conveys expert's belief regarding veracity does not assist jury, but usurps its role

3) Belief as to veracity need not be express; testimony that amounts to an opinion that another witness is lying is inadmissible

St v Kuehl
199 Wis. 2d 143
(Ct. App. 1995)

4) When witness's testimony is inconsistent with that of another, examiner may not restate latter's testimony and ask witness if the other was not telling the truth or was mistaken

B. Exceptions

St v Jackson
187 Wis. 2d 431
(Ct. App. 1994)

1) When intended purpose or effect is to impeach, explain, or highlight differences in testimony, NOT to attest to another witness's credibility

St v Davis
199 Wis. 2d 513
(Ct. App. 1996)

2) When comment relates to another witness's out-of-court demeanor

St v Eugenio
219 Wis. 2d 391 (1998)

3) When victim's character for truthfulness attacked, prior consistent oral statements can be introduced under "rule of completeness"

St v DeSantis
155 Wis. 2d 774 (1990)
St v Bednarz
179 Wis. 2d 460
(Ct. App. 1993)

C. Expert testimony regarding post-assault conduct of sexual assault or battery victim does not contravene rule in Sec. 2.A., above, as long as witness does not comment on complainant's credibility

St v Jensen
147 Wis. 2d 240 (1988)
St v Hernandez
192 Wis. 2d 251
(Ct. App. 1995)
St v Richardson
189 Wis. 2d 418
(Ct. App. 1994)

1) Expert may describe behavior of victims and other commonly observed indicators of same type of crime to dispel common misperceptions or to inform as to how victims commonly act (*see* para. 3)a. below)

2) Relevant facts regarding complainant's post-assault behavior, including expert's description of that behavior, may be admitted as circumstantial evidence that assault occurred

3) Expert may then be asked if complainant's behavior consistent with that of other victims

St v Vinson
183 Wis. 2d 297
(Ct. App. 1994)
St v Richardson
189 Wis. 2d 418
(Ct. App. 1994)

a. Admissible as circumstantial evidence that assault occurred, especially if it explains context in which victim's statement was made, if it rebuts Def's suggestion that victim's charge is fabricated, or prevents false assumptions regarding meaning of complainant's behavior

St v Richardson
189 Wis. 2d 418
(Ct. App. 1994)

b. Comparison testimony not admissible if testimony has effect of expressing expert's belief as to

- Witness's veracity
- Witness's actual beliefs at time of offense
- Reasonableness of witness's beliefs
- Witness's state of mind before, during, or after event

St v Kirschbaum
195 Wis. 2d 11
(Ct. App. 1995)

4) Testimony regarding general concepts of memory, observation and perception, distortion, etc., is within Ct's discretion

5) Expert may testify as to susceptibility of young children to suggestive interview techniques and how such techniques can affect reliability of child's account of actual events

St v Richardson
189 Wis. 2d 418
(Ct. App. 1994)

6) Same test applies to Def's or State's expert

3. Expert Testimony on Capacity to Form Intent

St v Flattum
122 Wis. 2d 282 (1985)
St v Repp
122 Wis. 2d 246, 249 (1985)
St v Steele
97 Wis. 2d 72 (1980)
St v Morgan
195 Wis. 2d 388 (Ct. App. 1995)

A. Opinion evidence on Def's capacity to form a criminal intent, based in whole or part on mental health history properly excluded

1) Not competent, relevant, or probative

2) In both bifurcated and single-stage trials

St v Flattum
122 Wis. 2d 282, 305 (1985)

B. But non-opinion testimony as to Def's mental health history admissible, if otherwise relevant

St v Steele
97 Wis. 2d 72, 98 (1980)

1) As well as ordinarily admissible evidence on state of mind

§ 939.42(2)

4. Expert Testimony on Intoxication

St v Flattum
122 Wis. 2d 282, 293 (1985)
St v Repp
122 Wis. 2d 246 (1985)
Loveday v St
74 Wis. 2d 503 (1976)

A. Properly qualified expert on effects of intoxication may testify about effect of intoxication on ability to form intent

1) Only if testimony rests solely on Def's voluntary intoxicated condition

2) Cannot be joined to mental health history

3) In both bifurcated and single-stage trials

St v Mendoza
80 Wis. 2d 122 (1977)

4) Ct may restrict pathologist's testimony on behavioral effects of alcohol

St v Chitwood
2016 WI App 36, ¶¶ 33–34, 369 Wis. 2d 132

B. Drug recognition expert is subject to *Daubert* analysis

St v Flattum
122 Wis. 2d 282, 296
(1985)

C. Apply § 907.02 as to qualification of expert and purpose of testimony

1) May be psychiatrist

2) May be other expert

Staples v St
74 Wis. 2d 13 (1976)

3) Def himself or herself not qualified to establish intoxication defense

Fischer v Ozaukee Cty Cir Ct, 741 FSupp2d 944
(ED Wis 2010)

D. Expert testimony on intoxication—Expert may rely in part on PBT results in OWI cases

5. Expert Testimony on Post-assault Conduct

St v DeSantis
155 Wis. 2d 774 (1990)
St v Robinson
146 Wis. 2d 315 (1988)
St v Bednarz
179 Wis. 2d 460
(Ct. App. 1993)

A. In discretion of Ct, expert qualified by training or experience may testify on behavior exhibited by sexual assault victims

1) To educate jury when complainant's conduct attacked as inconsistent with sexual assault or domestic violence

2) Such testimony may serve useful purpose of disabusing jury of widely held misconceptions about

a. Sexual assault victims

St v Mayer
220 Wis. 2d 419
(Ct. App. 1998)

b. Victims of domestic violence

St v Mader
2023 WI App 35
408 Wis. 2d 632
pet for rev denied
St v Morales-Pedrosa
2016 WI App 38
369 Wis. 2d 75

3) Expert testimony on general statistics regarding false reporting may constitute impermissible vouching when considered with other testimony

St v Jensen
147 Wis. 2d 240 (1988)

B. Expert witness may be asked to describe behavior of complainant and then to describe behavior of victims of same type of crime, if testimony helps jury understand complainant's reactive behavior

1) Ct determines whether testimony will assist fact-finder understand evidence or determine fact in issue

2) Expert must not be allowed to convey to jury own beliefs as to veracity of complainant

St v Pittman
174 Wis. 2d 255 (1993)

a. The same test applies to the expert of the Def or State

3) Relevant facts regarding complainant's behavior after assault may be admitted as circumstantial evidence that assault occurred

6. Expert Testimony on Character

St v Walters
2004 WI 18, ¶ 44
269 Wis. 2d 142

A. Def may call expert regarding pertinent character trait

§ 904.04(1)(a)
St v Richard AP
223 Wis. 2d 777
(Ct. App. 1998)

1) Def may be permitted to call expert to testify that Def has no character traits consistent with a perpetrator of the alleged crime

St v Davis
2002 WI 75
254 Wis. 2d 1

2) If Def's expert testifies, implicitly or explicitly, to facts surrounding crime, Def waives right to self-incrimination, and State allowed to have its own independent examination of Def

7. Procedure If Challenge Raised

A. Hearing on motion in limine

St v Hogan
2021 WI App 24, ¶ 26
397 Wis. 2d 171

1) Trial Ct determines by a preponderance of evidence whether expert testimony is admissible

2) Before trial

a. Inherent authority of Ct to expedite trial

§ 971.23(1)(e), (2m)(am)

b. Production of statements (report) may be ordered before trial

3) Upon offer of testimony at trial

St v Dodson
219 Wis. 2d 65 (1998)

a. If hearing held, question-and-answer format recommended for offer of proof

CR 28: HYPNOSIS/POLYGRAPH/DNA

HYPNOSIS ..... **CR 28-1**
1. Per Se Ban Unwarranted in Criminal Trials ..... CR 28-1
2. Procedure for Determining Admissibility ..... CR 28-2
3. Procedure When Testimony Found Admissible ..... CR 28-4

POLYGRAPH ..... **CR 28-5**
1. Discovery of Polygraph Results ..... CR 28-5
2. Polygraph Results Not Admissible in Any Criminal Proceeding ..... CR 28-6
3. Postpolygraph Statements ..... CR 28-7
4. Offer to Take Polygraph Examination ..... CR 28-8

DNA ..... **CR 28-9**
1. Definition ..... CR 28-9
2. Introduction of DNA Evidence at Trial ..... CR 28-9
3. Offer to Undergo DNA Testing ..... CR 28-10
4. DNA Sampling ..... CR 28-11

HYPNOSIS

1. Per Se Ban Unwarranted in Criminal Trials

Rock v Arkansas
107 SCt 2704 (1987)
St v Armstrong
110 Wis. 2d 555 (1983)
St v Coogan
154 Wis. 2d 387
(Ct. App. 1990)

A. Before trial, Ct must determine admissibility of testimony "refreshed" by hypnotic session

B. Any party may use hypnosis to refresh witness recollection, provided

1) Subsequent identification and testimony not result of impermissibly suggestive hypnosis session, and

2) Adverse party allowed to present expert testimony regarding effect of hypnosis on memory

Armstrong v Young
34 F3d 421
(7th Cir 1994)

C. Def's rights to confrontation and due process not denied, provided

1) Def given opportunity to cross-examine witness subjected to hypnosis, and

2) Def permitted to introduce testimony on witness's prehypnosis recollection, and

3) Def permitted to introduce expert testimony regarding effect of hypnosis

St v Armstrong
110 Wis. 2d 555 (1983)

2. Procedure for Determining Admissibility

A. Notice

1) Proponent must notify adverse party of intent to use testimony of witness subjected to hypnosis

2) Notice must be given before trial

a. To allow motion to suppress

b. To allow for pretrial suppression hearing

B. Suppression hearing

1) Burden on proponent of use of hypnosis

a. To show reliability of testimony, and

b. To show reliability of identification

2) Ct to determine effect of specific hypnotic session on witness's testimony

a. Determination subject to Ct's discretion

b. Whether, as result of events occurring during hypnotic session, any subsequent statements made by subject should be considered so unreliable as not to be admissible at trial

c. Not a determination of reliability of hypnosis in general

3) Required findings

a. No impermissible or unnecessary suggestiveness occurred during hypnotic process, and

b. Statements resulting from hypnotic process reliable under totality of circumstances

C. Guidelines for determination of suggestiveness

1) Administrator of hypnosis should be mental health person with special training in use of hypnosis

   a. Preferably psychiatrist or psychologist

2) Administrator should be independent and not be responsible to prosecution, investigators, or defense

3) Administrator should receive written memo with necessary facts

   a. Should not be orally informed about case

   b. Care should be exercised to avoid communication that might influence administrator's opinion

4) All contact between administrator and subject to be videotaped from beginning to end

5) No parties or their representatives to be present during hypnotic session

6) Administrator to examine subject before hypnosis

   a. To exclude possibility that subject physically or mentally ill, and

   b. To confirm subject possesses sufficient judgment, intelligence and reason to comprehend what is happening

7) Administrator to obtain detailed prehypnosis statement from subject regarding facts as subject believes them to be

8) Administrator to avoid adding new elements to subject's description of experience before, during, and after actual hypnotic session

9) Ct to consider any other evidence tending to corroborate or challenge information gathered during trance or as result of posthypnotic suggestion

D. Extent of compliance with guidelines not determinative of admissibility issue

1) Complete compliance does not guarantee admission of witness's testimony or identification

2) Noncompliance does not require exclusion

St v Coogan
154 Wis. 2d 387
(Ct. App. 1990)

3) Admissibility of hypnotically refreshed recollection discretionary with Trial Ct

E. Ct to determine reliability of statements under totality of circumstances

St v Armstrong
110 Wis. 2d 555 (1983)

1) Ct to consider possibility of confabulation

a. When witness does not have complete memory of events and tends to fill gaps with information not really recalled

b. Ct must consider effect of possible confabulation on witness's testimony

c. Confabulation can occur even without hypnosis

2) Ct to consider other evidence which corroborates or challenges information obtained during trance or as result of posthypnotic suggestion

St v Armstrong
110 Wis. 2d 555 (1983)

3. Procedure When Testimony Found Admissible

A. If admissible for State

1) State may not reveal fact of hypnosis in case-in-chief

a. Avoids risk of popular misconception by jury that hypnotized people always tell truth, and

b. Allows Def an election to challenge witness's credibility

- On grounds raising hypnosis issue, or
- On other grounds, or
- Both

2) Def may elect to challenge witness credibility by raising hypnosis issue

a. By cross-examination of witness

b. By introducing witness's prehypnotic testimony

c. By expert testimony concerning reliability and effect of hypnosis on memory

3) If Def raises hypnosis issue, State may introduce expert testimony in rebuttal to counter Def's challenge

4) If Def does not elect to challenge witness credibility by raising hypnosis issue

a. State may not reveal to jury fact that witness's recollection refreshed by hypnosis

b. State may not introduce expert testimony on hypnosis in rebuttal

Recommendation

B. If admissible for defense, same criteria as above, but roles reversed

POLYGRAPH

§ 905.065

1. Discovery of Polygraph Results

§ 905.065(2)

A. Privileges of subject of polygraph examination

1) Subject may refuse to disclose information

2) Subject may prevent others from disclosing information

§ 905.065(4)

3) Exception

a. Discovery permitted if written agreement exists between subject and person administering examination, provided

- Agreement valid, and
- Agreement voluntary

§ 905.065(2)

B. Information protected against discovery

1) Any results of examination, and

2) Any oral or written communications during examination

§ 905.065(3)

C. Privileges may be claimed by

1) Subject of examination, or

2) Subject's guardian or conservator, or

3) Subject's personal representative, if subject deceased

St v Dean
103 Wis. 2d 228 (1981)

2. Polygraph Results Not Admissible in Any Criminal Proceeding

US v Scheffer
118 SCt 1261 (1998)
St v Wofford
202 Wis. 2d 523
(Ct. App. 1996)

A. Testimony that inferentially puts the results of a polygraph before jury is inadmissible

St v Stanislawski
62 Wis. 2d 730 (1974)

B. Exception: Admissible only if *Stanislawski* stipulation executed on or before September 1, 1981

C. *Stanislawski* stipulation requirements

1) In writing after charges filed

2) Signed by DA, Def, and Def Atty

3) Providing for

a. Def's submission to polygraph

b. Subsequent admission at trial of graphs and examiner's opinion

4) May apply to witnesses as well as Def

St v Mendoza
80 Wis. 2d 122 (1977)

D. Admissibility hearing considerations

1) Manner in which test given

2) Sufficiency of data on which conclusion based

3) Qualifications of examiner

McLemore v St
87 Wis. 2d 739 (1979)

4) Defense may present experts to impeach examiner

E. Examiner may be cross-examined at trial

St v Mendoza
80 Wis. 2d 122 (1977)

1) Ct has discretion to prevent party from calling expert impeachment testimony

St v Stanislawski
62 Wis. 2d 730 (1974)

F. Cautionary jury instruction required when results of test admitted

3. Postpolygraph Statements

A. Case-in-chief

St v Vice
2021 WI 63, ¶ 25
397 Wis. 2d 682
St v Davis
2008 WI 71
310 Wis. 2d 583

1) May be admissible if statement separate in time and content from the mechanical polygraph examination

a. Whether separate or distinct determined by consideration of totality of circumstances; no dispositive, bright-line rule

b. Factors may include, without limitation

- Interview's temporal proximity to actual test
- Discrete exam/interview rooms
- Whether references to exam were made during interview
- Whether Def was told exam was over
- Whether references made to failed exam to elicit inculpatory statements
- Whether officer conducting exam differed from officer conducting interview

2) If separate in time and content, general rules of admissibility apply

St v Vice
2021 WI 63, ¶ 36
397 Wis. 2d 682

a. Voluntary

- Reference to polygraph results during post-polygraph interview is not per se coercive; must consider totality of the circumstances

b. Noncustodial/*Miranda* compliance

§ 904.02, § 904.03

c. Relevant and not prejudicial

B. Statement used to impeach Def

St v Johnson
193 Wis. 2d 382
(Ct. App. 1995)
St v Pickett
150 Wis. 2d 720
(Ct. App. 1989)

1) Statement inadmissible as too closely associated with actual test, admissible to impeach Def

2) Statement must be voluntary; not "compelled"

St v Pickett
150 Wis. 2d 720
(Ct. App. 1989)

3) Ct should give cautionary instruction to consider statement only for impeachment purposes and not as substantive proof of facts in Def's statement

St v Hoffman
106 Wis. 2d 185
(Ct. App. 1982)

4. Offer to Take Polygraph Examination

A. Offer admissible

1) When offer relevant to assessment of offeror's credibility, and when purpose for introducing offer limited to credibility

St v Santana-Lopez
2000 WI App 122
237 Wis. 2d 332

a. May reflect "consciousness of innocence"

St v Shomberg
2006 WI 9, 288 Wis. 2d 1

2) Def must demonstrate that Def believed that a polygraph was possible, accurate, and admissible

St v Shomberg
2006 WI 9, 288 Wis. 2d 1

3) If Def merely agrees to take polygraph, as opposed to offering to take polygraph, not admissible

St v Pfaff
2004 WI App 31, ¶ 29
269 Wis. 2d 786

4) If offer to submit to a polygraph is made at request or suggestion of Atty, it is <u>not</u> probative as consciousness of innocence and therefore not admissible

St v Hoffman
106 Wis. 2d 185
(Ct. App. 1982)

B. Withdrawn offer admissible

1) When withdrawn offer relevant to assessment of offeror's credibility, and

2) When purpose for introducing withdrawn offer limited to credibility

DNA

1. Definition

§ 939.74(2d)(a)

A. "Deoxyribonucleic acid profile" means an individual's patterned chemical structure of genetic information identified by analyzing biological material that contains the individual's deoxyribonucleic acid

2. Introduction of DNA Evidence at Trial

§ 971.23(9), § 972.11(1)
St v Peters
192 Wis. 2d 674
(Ct. App. 1995)

A. Proponent's action

1) Proponent notifies other party in writing at least 45 days before trial date and provides other party, within 15 days after request, with material relating to DNA evidence

a. Ct to exclude evidence if notice and production deadlines not met, UNLESS

- Ct waives 45-day notice requirement, or
- Ct extends 15-day production requirement

b. Ct may waive or extend time if parties stipulate, or for good cause, and Ct finds no party will be prejudiced by waiver or extension

B. If other party makes request, they must receive, within 15 days after request

§ 971.23(1)(e)
St v Thomas
150 Wis. 2d 374 (1989)
St v Copening
100 Wis. 2d 700 (1981)

1) Any relevant written or recorded statements of a witness named under § 971.23(1)(d), and

a. Any audiovisually recorded oral statement of a child under § 908.08

b. Expert reports or summaries including

- Physical exams
- Mental exams
- Scientific tests or comparisons

C. Ct may grant a continuance to provide exchange of information

St v McCoy
2007 WI App 15
298 Wis. 2d 523

D. State must establish chain of custody

3. Offer to Undergo DNA Testing

St v Santana-Lopez
2000 WI App 122
237 Wis. 2d 332

A. May reflect "consciousness of innocence"

4. DNA Sampling

A. At arrest. ***See*** **CR 7, Sec. 3**

B. Upon conviction. ***See*** **CR 37, Sec. 1.R.**

§ 973.047(1f)

1) Upon any criminal conviction, DNA sample required. If not already on file with DOJ, see **CR 37**

2) Inform Def of right to request expungement under § 165.77(4) if conviction reversed, set aside, or vacated

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